STATE OF ILLINOIS	)	☐ Affirm and adopt (no changes)	☐ Injured Workers' Benefit Fund (§4(d))
	) SS.	☐ Affirm with changes	☐ Rate Adjustment Fund (§8(g))
COUNTY OF COOK	)	☐ Reverse	☐ Second Injury Fund (§8(e)18)
			☐ PTD/Fatal denied
		☐ Modify	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Josefina Danek,

Petitioner,

vs.

NO: 07 WC 07034

14IWCC0371

Cook County Department of Public Health,

Respondent.

DECISION AND OPINION ON REMAND

This matter comes before the Commission on remand from the Circuit Court of Cook County. A majority of the Commission found that Petitioner failed to give timely notice to Respondent of her alleged repetitive trauma injuries involving the bilateral upper extremities. The Commission did not clearly state whether Petitioner's untimely notice resulted in prejudice to Respondent. In an order dated December 5, 2013, the Circuit Court of Cook County remanded the case to the Commission for a determination "whether under Section 305 6(c) there was any undue prejudice to the employer due to the timing of Petitioner's notice of accidental injury."

Findings of Fact and Conclusions of Law

In a Decision dated August 18, 2010, the Arbitrator concluded "[E]ven if notice was defective in some fashion, Respondent has not shown any prejudice by the notice it received. Petitioner's supervisor knew Petitioner was having trouble with the typing as Petitioner was using an ergonomic keyboard. Ms. Guajardo knew that Petitioner's hands were hurting while she was typing. Respondent suffered no prejudice from a defect in the notice. Respondent obtained and presented records, a witness and a medical expert." For the following reasons, we disagree with the Arbitrator's finding that there was no prejudice to Respondent.

Ms. Guajardo recalled that at some time she saw Petitioner use an ergonomic keyboard and she reasonably assumed there was a physiological motivation; however Petitioner did not discuss her complaints with Ms. Guajardo. Ms. Guajardo noted that Petitioner was not the only employee who electing to use a non-standard keyboard over the years. The fact that Ms. Guajardo noticed Petitioner's periodic use of an ergonomic keyboard does not negate the undue

14IWCC0371

prejudicial effect of Petitioner's untimely notice of accident.

Petitioner testified that she experienced symptoms in her hands as early as 1999. She testified that in 2004 her typing duties increased and she primarily used a standard keyboard, and that this caused a noticeable increase of her longstanding symptoms. Respondent disputed that Petitioner's actual volume of typing increased in 2004. Nevertheless, Petitioner testified that her symptoms improved while using an ergonomic keyboard that she brought to work. Whenever she used a standard keyboard, she experienced right hand numbness, tingling, pain and cramping. Petitioner's Application for Adjustment of Claim, filed February 1, 2007, alleged a manifestation date of June 15, 2005, corresponding to the approximate time she returned to using a standard keyboard and decided to seek treatment for her symptoms. Under Illinois law, the date of manifestation for repetitive trauma injuries is the date on which the claimant became aware of the condition and reasonably should have known it may be work related. While Respondent was not prevented from obtaining an after-the-fact examination and opinion by an expert pursuant to Section 12 of the Act, we find no justification in the facts of this case for Petitioner's failure to give timely notice to Respondent. The ability to promptly investigate the facts related to an alleged work accident is a basis for requiring prompt notice.

Petitioner admitted that as a supervisor herself she was familiar with the procedures for reporting injuries and pursuing a workers' compensation claim. She admitted she knew many weeks ahead of time that she would be having surgery in January of 2006. Her accident report was not completed until March 17, 2006, when she returned to work. We have carefully reviewed and considered the remand order from the Circuit Court, and based on that mandate have reexamined the credible record. The preponderance of the evidence shows that Petitioner delayed notice to Respondent, and that this delay was unreasonable under the facts of the case and caused undue prejudice to Respondent.

The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: MAY 20 2014
RWW/plv
o-3/19/14
46

Ruth W. White

Daniel R. Donohoo

DISSENT

I continue to dissent for the same reasons as originally stated in my dissent dated May 4, 2012.

Charles J. DeVriendt

STATE OF ILLINOIS)
) SS.
COUNTY OF MADISON)

☐ Affirm and adopt (no changes)	☐ Injured Workers' Benefit Fund (§4(d))
☐ Affirm with changes	☐ Rate Adjustment Fund (§8(g))
☒ Reverse Accident	☐ Second Injury Fund (§8(e)18)
	☒ PTD/Fatal denied
☐ Modify	☐ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

REBECCA TOON,
WIDOW OF MICHAEL TOON,
DECEASED,

Petitioner,

vs.

NO: 10 WC 10626

14IWCC0372

POWER MAINTENANCE &
CONSTRUCTORS, LLC,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issues of accident, causal connection, medical expenses, temporary total disability, nature and extent, and "fatality, Section 19(d), rulings on objections" and being advised of the facts and law, hereby reverses the Decision of the Arbitrator on the issue of accident but attaches the Decision of the Arbitrator, which is made a part hereof, for the purpose of the findings of fact with the modifications and additions noted below.

The Commission finds that Petitioner failed to meet her burden of proof that her husband, Michael Toon (hereafter "Decedent"), sustained accidental injuries arising out of and in the course of his employment. Although there is conflicting testimony and evidence, we find that it is more likely than not that Decedent's abdominal cellulitis was not caused or aggravated by him rubbing his abdomen on the steering wheel of the lull he drove at work.

The Commission notes that there is no objective evidence regarding Decedent's girth such as photographs or medical records indicating his measurements. No autopsy was performed and, other than Decedent's recorded weight and general descriptions such as "morbidly obese" in the medical records, the evidence is limited to witness testimony regarding the size of his stomach.

Petitioner testified that Decedent was about 6'2" tall and weighed 240-245 pounds but "most of it was the belly." He had very skinny legs and skinny arms but he had a big back and a big stomach. (T.19).

Decedent's sister, Connie Sauerwein, testified that he was "pear shaped" and had a "big round belly." She saw him regularly and he was generally sitting in his recliner wearing shorts. She testified, "If I went to see Mike, he was in his recliner, you would think he was nude because his stomach would come over top of his shorts." (T.44-46).

A long-time friend of Decedent's, Meryl Michael Huch, testified that he had known Decedent for "umpteen years" and he had a "real big" stomach. (T.48-49). Mr. Huch testified that he worked on the same job site as Decedent beginning in October 2009 and, although they worked on opposite ends of the plant, Decedent came to see him periodically. (T.52). Mr. Huch testified that he saw Decedent in the lull with the door opened and that he would walk up to Decedent to talk to him because it was hard for Decedent to get in and out of the lull "because he was so fat." (T.54). Mr. Huch testified that he has operated a lull himself before and there is a knob on the steering wheel for faster steering. (T.51). He testified that when he saw Decedent in the lull facing straight ahead the steering wheel was pushing in to his belly and that it was "obvious" that, if Decedent had been steering, the wheel would have rubbed against his stomach. (T.54-55). Despite this assertion, Mr. Huch testified that Decedent could still operate the machine stating, "You can operate the machine with your right hand. You're just steering it with your left." (Id.)

Directly contradicting Mr. Huch's observations was the testimony of Respondent's witness, John Bush. Mr. Bush testified that he was the Safety Manager at the job site Decedent worked at from June 2009 to the end of January 2010. (T.67). He testified that Decedent didn't have any issues operating the lull but Decedent was driven to and from the lull and around the job site by the operator steward as an accommodation by Respondent due to Decedent's overall health, which included heart trouble. (T.69). Mr. Bush described the job of a lull operator and noted that it has an "assist knob" for steering because they have to make a lot of tight turns. He testified that the seat is adjustable forward/backward close to seven inches. (T.70-72).

Mr. Bush testified that he "absolutely" observed Decedent and other operators while they were operating the lulls. He would check for seat belts and other safety violations and he was also able to see the lulls operating from his office. (T.75-76). Mr. Bush generally spoke to each person to see if things were okay and how they were feeling that day. (T.77). Mr. Bush last spoke with Decedent on January 27, 2010, when Decedent's lull had a flat tire. Decedent turned in his seat to face out of the lull and had the door opened on the cab. Mr. Bush asked Decedent how he was doing and Decedent said he was "feeling pretty good." Mr. Bush testified that they "chatted for quite some time" and, although they talked about other health issues, Decedent did not have any complaints about his stomach. (T.78-79).

Mr. Bush testified that, on the occasions that he spoke with Decedent, he was in a normal position for operating the cab and there was space between the steering wheel and his body every time he saw him. (T.79). Mr. Bush testified that Decedent did not always keep the door to the lull closed and that he had opportunities to observe Decedent while he operated the lull. Decedent's body was always away from the steering wheel. When Mr. Bush would go up into the cab to see if he was wearing a seat belt, there would be three to four inches between Decedent and the steering wheel. (T.81-82).

Mr. Bush testified that he had operated a lull himself 200 times and answered:

Q: Can a lull be operated, can the steering wheel be turned with the operators [sic] stomach against the steering wheel?
A: No.
Q: Why is that?
A: Because when you got to hold the ball, when you come around, you're going to hit your belly on either side, seriously it can't be done.

(T.82-83). Mr. Bush testified that Decedent's operation of the lull was similar to any of the other operators and he maintained the same speed, stopping and starting, turning radius, and there was no problem with the smoothness of his pickup or delivery. (T.83).

Mr. Bush testified that he took photographs (RxA) for the purpose of investigating this claim and that they accurately depict what he observed regarding the lull and other operators within the cab. The measurements are the distance between the steering wheel and the operators who were sitting in the cab, which has an adjustable seat. (T.84). Mr. Bush testified that the lull operators depicted, Rodney Moss and Gerald Bathon, are similar to Decedent in general height and physical size in terms of the stomach. (T.85). Mr. Bush stated that in picture #11, there is 6½ inches between Mr. Moss' stomach and the steering wheel but that even if Mr. Moss pushed the seat all the way up, there was still ¾ of an inch to an inch of distance between the wheel and his stomach (picture #8). (T.86). Mr. Bush explained that, if the seat was all the way up, an operator with their height would have trouble getting to the brake and throttle and that would place the lever farther back for operation. (T.87). When he observed Decedent in the lull, Decedent was never as close to the steering wheel as the position depicted in picture #8. (Id.).

Mr. Bush testified that the video (RxB) accurately depicts Mr. Moss sitting in the cab, the movement of the seat, and the operation of the lull. The end of the video shows that he was using the knob to turn the steering wheel. Mr. Bush explained that nobody steers with two hands on the wheel because it takes multiple turns in tight areas and the knob facilitates making the turns easier. (T.88-89). Mr. Bush testified:

Q: Why can't the wheel be turned, if the operators stomach is pressed against the wheel?
A: You are going, the knob will hit you before you can get it turned, if you are sitting up that close.
Q: So what are you saying, what would have happened to the turn if that happened?
A: That would be as far as you could turn, if you kept continuing forwards, you would probably hit something.
Q: The way Mr. Moss was depicted in this video of operating that lull, is that the way Mr. Toon operated the lull?
A: Yes.

(T.90-91). On cross-examination, Mr. Bush reiterated that Decedent was the same size as the other gentlemen and their hands do not hit their bellies if they are using the knob for steering. Mr. Bush explained that you have to scoot the seat far enough back so that you don't obstruct your steering:

Q: And if Michael Toon was so big that he couldn't get his seat back that far, then he would hit his belly?

A: He wasn't, he was a safe operator.
Q: If other people saw him in the machine with the door opened and his belly up against the wheel – are you just saying you didn't see it that way?
A: No.

(T.92-93). On redirect examination, Mr. Bush testified that if someone else said that Decedent's stomach was up against the steering wheel, that would not make any sense based upon his observations. (T.94).

Mr. Huch testified in rebuttal that he knows Rodney Moss and Gerry Bathon from being in the union and that Decedent had a "lot bigger stomach." However, he did not know how much any of them weighed. (T.99-101).

The Commission resolves the conflicting testimony between Mr. Huch and Mr. Bush by finding that the video and photographs support a finding that Mr. Bush is more credible on the issue of whether Decedent's belly pushed against the steering wheel when he operated the lull. Both Mr. Bush and Mr. Huch testified that Decedent was able to operate the lull without any problems and the Commission finds it highly improbable that Decedent would have been able to perform his job if the steering wheel, or the knob, or his hand was continually in contact with and rubbing his stomach.

After being shown several photographs of the lull and being presented with a hypothetical involving the assumption that Decedent's stomach did, in fact, rub against the steering wheel, Dr. Sri Kolli testified that his work activities could have partly contributed to the trauma that caused the cellulitis. (Px2 at 31-31). However, on cross-examination, Dr. Kolli admitted that she is not an engineer or forensic accident reconstruction expert and she did not do any measurements on Decedent to determine how he fit into the lull. (Id. at 34-35). She did claim that she had "some amount of reasonable certainty by looking at the pictures because I am familiar with Mr. Toon's body, how big he is and how he would look sitting in that chair. Other than that, I cannot tell you beyond that." (Id. at 35). She opined that the lower part of Decedent's abdomen would have been resting on the steering wheel. (Id. at 40).

However, it is clear that Dr. Kolli's opinion is based on speculation:

Q: ... Okay. Well, for instance, looking at...Petitioner's Exhibit Number 2, which shows the wheel and the yardstick and the chair. Do you see that?
A: Yes, I do.
Q: What's the distance between that wheel and the back of the...front of the back of the chair – forward part of the back of the chair?
A: I would imagine it's definitely less than six inches.
Q: This is speculation on your part?
A: Yes.

(Id. at 35-36). The Commission finds that the angle from which this photograph was taken minimizes the visual appearance of the distance between the back of the seat and the steering wheel and it also appears that the seat is pushed forward in this picture. When the other photographs and video evidence are considered, it is clear that there is a much greater distance between the steering wheel and the back of the chair than Dr. Kolli speculated. Furthermore, it does not appear that Dr. Kolli was aware that the seat was adjustable. Nor does it appear that she had viewed the video of the lull in operation or any photographs of anybody sitting in the seat to

be able to compare their body type and size to Decedent.

Therefore, we find that Dr. Kolli's opinion is based on incomplete evidence, an inaccurate perception of the distances involved in the cab, and is not consistent with the other evidence in the record that supports our finding that Decedent would not have been able to perform his job if his stomach was resting on the steering wheel.

We next address the credibility of Decedent's statements to others regarding the cause of his sores. The January 29, 2010 record of Dr. Kolli, which she also testified about, indicates that the E.R. physician noticed redness on Decedent's abdominal wall with several skin abscesses. Decedent told Dr. Kolli that "he started breaking down into abscesses because his stomach wall rubs against the steering wheel while he works. ... This was several weeks ago and he decided to let them go." Another record, by Dr. Orzechowski, indicates that Decedent stated that "the steering wheel rubs on his abdomen, causing the pustules." Petitioner testified that Decedent told her in the hospital that he believed the sores were from "fat and the steering wheel was rubbing on his belly." (T.35). Mr. Huch testified that Decedent told him, also in the hospital, that he believed the sores were caused by the steering wheel rubbing against his stomach. (T.58). The question is whether Decedent's assertions are credible when considered in light of all the other evidence.

The Commission notes that there is no evidence that Decedent ever mentioned to anyone, prior to his hospitalization, that the steering wheel at work was causing him any problems. Mr. Bush testified that when he last spoke to Decedent on January 27, 2010, there was no mention of any stomach problems. Petitioner did not testify regarding any problems with Decedent's abdomen prior to the morning when the ambulance was called. Dr. Kolli admitted that there are no records of Decedent having complaints of pain regarding the skin of his abdomen before he arrived at the hospital. (Px2 at 50).

Petitioner did testify that between the time Decedent began working for Respondent in June 2009 and February 2010 when he was admitted to the hospital, his body shape stayed the same. (T.22). Dr. Kolli testified that, although Decedent had gained about 45 pounds in the year and a half before he died, she did not believe that Decedent gained a lot of weight between his last visit with her on September 24, 2009, when he weighed 268 pounds, and when he went into the hospital on January 29, 2010, because the hospital records indicate that he weighed 265 pounds. (Px2 at 51). Dr. Kolli testified that Decedent did not have skin abscesses on his abdomen when she saw him in the office at his last visit. (Px2 at 17).

The Commission finds that Decedent had been working for Respondent for several months by the time of his last office visit with Dr. Kolli on September 24, 2009, and there was no indication at that time of any complaints by Decedent about his abdomen, no mention of the steering wheel rubbing on his abdomen, and no examination findings consistent with his skin being rubbed by a steering wheel. If Decedent's abdomen had been rubbing on the steering wheel, we find it more likely than not that he would have developed abrasions, pustules, or sores within a short time after beginning his job driving the lull at Respondent.

The Commission notes other inconsistencies in Decedent's statements regarding the timing of the onset of his abdominal condition. Dr. Kolli's record indicates that Decedent said he had been suffering from the abscesses for several weeks but chose to ignore them. However, the record of Dr. Pritz states that Decedent "has not noted the abdominal wall redness until it was pointed out to him in the ER." Dr. Slom wrote that Decedent stated that "he has noticed erythema of his lower abdominal wall for the last few days, but his wife says that over the last few weeks he has had several pustules over his anterior abdominal wall which he has been

scratching."

Even if we were to find that Decedent's abdomen was rubbed occasionally by the steering wheel, it is still speculative whether the area that was rubbed against was also the same area where he developed the sores. Dr. Kolli testified that Decedent had a "fiery red area" that appeared "like a crescent or quarter circle" (Px2 at 19) and that based on the history, the pattern of cellulitis, and by looking at the pictures of the lull, she thought it was related to his work and the steering wheel (Id. at 43). However, she also admitted that she never saw Decedent while he was dressed so she could not say where the cellulitis was located in relation to his belt line. (Id. at 44). She also testified that it was possible that Decedent's personal hygiene was responsible for his cellulitis. (Id.) There is no discussion about whether the shape of the red area followed the normal countours of the human body.

Dr. Kolli testified that she looked all over Decedent's body and there were no other areas on his skin that were abnormal; otherwise she would have mentioned those areas also. (Px2 at 39). However, this is inconsistent with the records of Dr. Wright, who recorded that Decedent also had cellulitis on the upper portion of his lower extremities, and Dr. Slom who recorded that Decedent had erythema over both of his knees along with a pustule above his left kneecap. This is a critical fact. The Commission finds that the presence of cellulitis and pustules in other areas of Decedent's body are inconsistent with Dr. Kolli's opinion that his abdominal cellulitis was caused by the steering wheel at work.

Dr. Kolli admitted that if Decedent's cellulitis could be explained by some other source then it would not be work-related. (Px2 at 56). She also admitted that something as simple as his belt on his abdomen after gaining 40 pounds could have been the source of the cellulitis. (Id.) Respondent's Section 12 physician, Dr. Schrantz, opined that any other chronic chafing would lead to a similar injury and that Decedent's belt or pants that fit tightly could also explain the injury. (RxC). Petitioner testified that Decedent wore jeans at work and that his stomach hung down over the top of them. (T.24, 40-42). Mr. Bush testified that the last time he spoke with Decedent, he was "probably wearing jeans and a sweat shirt." (T.79).

Although the Commission finds that Decedent did not regularly wear a belt, he did regularly wear jeans. Since Decedent had gained significant weight, we find it more likely than not that the location of the abdominal sores and the crescent-like presentation are consistent with Decedent's pants line.

Decedent had numerous, serious, and pre-existing health conditions including COPD, emphysema, high cholesterol, osteoarthritis, high blood pressure, uncontrolled diabetes, and ischemic cardiomyopathy. (Px2-DepPx7). Petitioner testified that Decedent came home from work on a Thursday and said that he told his boss he was sick. Decedent told Petitioner that it was his "stomach." Decedent was not hungry but he took a shower, sat in his recliner to watch television, and fell asleep. Around 4:30a.m., Decedent started screaming and when Petitioner went in to see him he was "shaking terribly" and said he was cold. Petitioner called Decedent's brother, Gary, who came over. Decedent "kept on saying he was sick to his stomach" so Gary pulled down Decedent's shorts. Petitioner testified that Decedent had two "real tiny little sores" about the size of a dime that were not "open." They were both below his navel with one on the right and one on the left. (T.26-29). On cross-examination, Petitioner clarified that these sores were about four to six inches below his navel. (T.41). Petitioner testified that Gary left because Decedent did not want to go to the hospital but he kept shaking so Petitioner called 911. (T.30). When the paramedics came, Decedent said he wanted to change his underwear but they wouldn't let him. Petitioner testified that when they took the blanket off, "another sore had popped up and

it was red." It was in the same general area but "it was a hole with blood in it." (Id.)

The Commission finds Petitioner's testimony significant in several respects. First, Decedent's sores were visible only after Decedent's shorts were pulled down, which indicates that they were either underneath or below the pant line. This would support a finding that the location of the sores is not where they would be if Decedent's protruding abdomen had repetitively and continually contacted the steering wheel while he drove the lull. Second, Petitioner had cellulitis on his thighs and a pustule above one knee. There is no allegation that the steering wheel was rubbing against the thighs and knees. Third, we find it significant that Petitioner did not testify that she saw any crescent shaped abrasions or sores at that time. Fourth, Petitioner did not testify regarding whether Decedent had any sores or pustules in the weeks leading up to his hospitalization. She did not explain the medical record of Dr. Slom, which indicates that Decedent stated that he noticed erythema of his lower abdominal wall for the last few days but that Petitioner ("his wife") said that Decedent had several pustules over the last few weeks and had been scratching them. The Commission finds it significant that Petitioner did not testify at all regarding this record since the inference and implication from her testimony is that she first noticed Decedent's sores on the morning that he was taken to the hospital.

The Commission finds that the steering wheel did not rub against or contact Decedent's stomach. Based on our review of the video and photographic evidence, we find that Mr. Bush's testimony regarding how Decedent fit into the cab of the lull and operated the machine is more credible than that of Mr. Huch. We find that Decedent would not have been able to perform his job if his abdomen was consistently and repetitively resting on the steering wheel. If his abdomen did rub against the steering wheel, we find that there would most likely have been at least some external indication of this by the time he was last examined by Dr. Kolli on September 24, 2009, since he had been working for Respondent since June 2009.

The Commission finds that Dr. Kolli's opinion is speculative and based on inaccurate and incomplete information. Her opinion that Decedent's stomach rested on the steering wheel at work is inconsistent with the video and photographic evidence. Her opinion that the shape of the cellulitis that she observed in the hospital was consistent with being rubbed on a steering wheel is not persuasive as it could also be attributed to Decedent's jeans. Furthermore, there was no explanation why Decedent also had cellulitis on his lower extremities and a pustule on his left knee. This leads us to the conclusion that the cellulitis was caused by something other than the steering wheel at work.

Dr. Kolli admitted that something as simple as his belt on his abdomen could have been the source of the cellulitis. There were no initial indications of abrasions or trauma to Decedent's abdomen that would be consistent with a mechanical trauma from the steering wheel. Petitioner testified that there were initially only two small, closed, dime-sized sores on Decedent's abdomen about four to six inches below and on the sides of his belly button. These were only noticed after pulling down Decedent's shorts. These facts indicate that Decedent's sores were underneath his pants line or below it. Either way, it is inconsistent with the claim that they were from his abdomen resting on and rubbing against the steering wheel. Based on all of the above, we find it more likely than not that Decedent's sores were caused by his jeans or some other idiopathic cause and we find that Petitioner has failed to meet her burden of proof that Decedent's job was a causal or aggravating factor in his development of the abdominal sores. We find that Petitioner has failed to meet her burden of proof that Decedent sustained accidental injuries arising out of and in the course of his employment

14IWCC0372

IT IS THEREFORE ORDERED BY THE COMMISSION that the Arbitrator's decision dated April 2, 2013, is hereby reversed and the awards are vacated.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall have credit for all amounts paid, if any, to or on behalf of Petitioner on account of said accidental injury.

The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: MAY 2 0 2014

Ruth W. White

Daniel R. Donohoo

SE/
O: 3/26/14
49

DISSENTING OPINION

I must respectfully dissent as I would have affirmed the Arbitrator's decision. I believe that the testimony of Mr. Huch was credible that Decedent's abdomen rubbed against the steering wheel of the lull at work. I also find Dr. Kolli's opinion on accident and causation to be supported by the evidence. Therefore, I would find that Decedent's employment with Respondent was at least *a* contributing factor in his development of abdominal cellulitis.

Charles J. DeVriendt

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION
FATAL

TOON, REBECCA WIDOW OF TOON, MICHAEL DECEASED
Employee/Petitioner

Case# **10WC010626**

14IWCC0372

POWER MAINTENANCE & CONSTRUCTORS LLC
Employer/Respondent

On 4/2/2013, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.10% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

A copy of this decision is mailed to the following parties:

0071 BONIFIELD & ROSENSTENGEL PC
JERALD BONIFIELD
16 E MAIN ST
BELLEVILLE, IL 62220

1109 GAROFALO LAW FIRM
JAMES R CLUNE
55 W WACKER DR 10TH FL
CHICAGO, IL 60601

STATE OF ILLINOIS)
)SS.
COUNTY OF **Madison**)

- ☐ Injured Workers' Benefit Fund (§4(d))
- ☐ Rate Adjustment Fund (§8(g))
- ☐ Second Injury Fund (§8(e)18)
- ☒ None of the above

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
FATAL

Rebecca Toon, Widow of Michael Toon, Deceased
Employee/Petitioner

v.

Power Maintenance & Constructors, LLC
Employer/Respondent

Case # **10** WC **10626**

Consolidated cases: _____

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **William R. Gallagher**, Arbitrator of the Commission, in the city of **Collinsville**, on **January 30, 2013**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. ☐ Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?

B. ☐ Was there an employee-employer relationship?

C. ☒ Did an accident occur that arose out of and in the course of Decedent's employment by Respondent?

D. ☐ What was the date of the accident?

E. ☐ Was timely notice of the accident given to Respondent?

F. ☒ Is Decedent's current condition of ill-being causally related to the injury?

G. ☐ What were Decedent's earnings?

H. ☐ What was Decedent's age at the time of the accident?

I. ☐ What was Decedent's marital status at the time of the accident?

J. ☐ Who was dependent on Decedent at the time of death?

K. ☒ Were the medical services that were provided to Decedent reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?

L. ☐ What compensation for permanent disability, if any, is due?

M. ☐ Should penalties or fees be imposed upon Respondent?

N. ☐ Is Respondent due any credit?

O. ☒ Other **19(d) Insanitary or injurious practices**

FINDINGS

On the date of accident (manifestation), **January 28, 2010**, Respondent *was* operating under and subject to the provisions of the Act.

On this date, an employee-employer relationship ***did*** exist between Decedent and Respondent.

On this date, Decedent ***did*** sustain an accident that arose out of and in the course of employment.

Timely notice of this accident ***was*** given to Respondent.

Decedent's death ***is*** causally related to the accident.

In the year preceding the injury, Decedent earned **$82,194.32**; the average weekly wage was **$1,580.66**.

On the date of accident, Decedent was **63** years of age, ***single*** with **0** dependent children.

Respondent ***has not*** paid all reasonable and necessary charges for all reasonable and necessary medical services.

Respondent shall be given a credit of **$0.00** for TTD, **$0.00** for TPD, $ **0.00** for maintenance, and $ **0.00** for other benefits, for a total credit of $ **0.00** .

Respondent is entitled to a credit of **$0.00** under Section 8(j) of the Act.

The Arbitrator finds that Decedent died on **February 11, 2010**, leaving **one** survivor(s), as provided in Section 7(a) of the Act, including **Rebecca Toon**.

ORDER

Respondent shall pay reasonable and necessary medical services as identified in Petitioner's Exhibit 4 as provided in Sections 8(a) and 8.2 of the Act subject to the fee schedule.

Respondent shall pay to Rebecca Toon, widow of Michael Toon, $1,053.77 per week for one and five-sevents (1 5/7) weeks commencing January 29, 2010, through February 10, 2010, that being the period of disability sustained by Michael Toon prior to his death on February 11, 2010.

Respondent shall pay to Rebecca Toon, widow of Michael Toon, $1,053.77 per week, commencing February 11, 2010, through January 30, 2013, and shall continue to pay that weekly amount until $500,000.00 or 25 years of benefits have been paid, whichever is greater, because the injuries caused the employee's death, as provided in Section 7 of the Act.

If Rebecca Toon remarries, Respondent shall pay her a lump sum equal to two years of compensation benefits, and all further rights of Rebecca Toon shall be extinguished.

Respondent shall pay $8,000.00 to Rebecca Toon for burial expenses as prescribed in Section 7(f) of the Act.

RULES REGARDING APPEALS Unless a party files a *Petition for Review* within 30 days after receipt of this decision, and perfects a review in accordance with the Act and Rules, then this decision shall be entered as the decision of the Commission.

STATEMENT OF INTEREST RATE If the Commission reviews this award, interest at the rate set forth on the *Notice of Decision of Arbitrator* shall accrue from the date listed below to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

Signature of Arbitrator

March 29, 2013
Date

APR 2 - 2013

Findings of Fact

Petitioner, Rebecca Toon (hereinafter referred to as "Petitioner"), filed an Application for Adjustment of Claim which alleged that she was the widow of Michael Toon (hereinafter referred to as "decedent"), and that her husband sustained an accidental injury arising out of and in the course of his employment for Respondent on February 3, 2010, that caused his death. According to the Application, decedent's accident occurred as a result of his being a lull operator and that this caused cellulitis of the abdominal wall and a systemic infection. Respondent denied liability on the basis of accident and causal relationship.

At trial, Petitioner testified that she was the widow of the decedent, and that they were married on July 17, 1976. Petitioner testified that her deceased husband spent most of his work life in construction but that he had most recently work for Respondent as an operating engineer. For several months prior to his death, decedent operated a device called a "lull" which is a large forklift type device that is used to move and raise various materials as required by whatever construction is taking place.

Petitioner described her husband's body type as being "pear-shaped" and that he was approximately 6'2" in height and weighed 240 to 245 pounds. She described that decedent had very skinny legs and arms, a large back and an absolutely huge stomach. At work, decedent would wear jeans and a t-shirt and would usually not wear a belt. He would generally not wear a jacket because, according to Petitioner, he was hot almost all of the time. When he returned home after work, decedent's customary practice was to take a shower and put on a pair of basketball shorts. Decedent generally did not wear a shirt and his lower abdominal area would hang over his shorts. Decedent would then eat his supper, sit in a recliner and watch television until it was time to go to bed. Petitioner testified that decedent had a number of other significant health issues in regard to his heart and lungs. Decedent was also a long–term smoker.

Connie Sauerwein testified on behalf of the Petitioner. Sauerwein was the decedent's sister and she also described decedent as being "pear-shaped" with a big stomach that protruded over his shorts. She did have occasion to personally observe decedent sitting in his recliner at home wearing just his basketball shorts.

Merryl Huch, one of decedent's co–workers, also testified on behalf of the Petitioner and stated that he knew decedent very well. Huch described decedent as being very fat and that his stomach protruded. Huch described the lull as being and all–terrain forklift and identified some photos of it. The lull has a steering wheel and a knob on the steering wheel so that it can be turned easier. Huch testified that, on numerous occasions, he personally observed decedent operating this device as well as getting in and out of it. Huch observed that decedent experienced difficulties in getting both in and out of the lull as well as operating it because he was so fat. Huch specifically noted that the steering wheel of the lull would rub against decedent's stomach.

Petitioner testified that on a Thursday evening, decedent informed her that he was sick, having stomach pains and that he needed to be seen by a doctor. Decedent slept in has recliner but his condition worsened to the point that Petitioner called Gary Toon, decedent's brother, to come over to their residence. Because of the severity of decedent's symptoms, the decision was made

to call an ambulance. At approximately that same time, Petitioner pulled down decedent's basketball shorts and observed two red sores on decedent's lower abdominal area which she described as being about the size of a dime with one below and another to the right of the navel. Shortly before the ambulance arrived to transport decedent to the Hospital, decedent started shaking and Petitioner observed another lower abdominal sore which appeared to be bleeding.

On January 29, 2010, decedent was taken to St. Anthony's Hospital, and was transferred into the intensive care unit. Decedent was treated by Dr. Sri Kolli, an internal medicine specialist, who had previously treated decedent since August, 2007. Dr. Kolli treated decedent for a number of medical conditions; however, the only treatment provided by her for any stomach issues was in January, 2008, when it was determined that decedent had esophagitis due to yeast which was successfully treated with medication.

The medical records of St. Anthony's Hospital were received into evidence and it was noted that decedent was admitted to the hospital for abdominal cellulitis. The records stated that decedent had several skin abscesses on the abdominal wall and that he informed them that he started breaking down into abscesses because his stomach wall rubbed against a steering wheel of a device that he operated. Decedent advised he had initially observed these abscesses several weeks prior but did not seek medical attention until that morning when they became "fiery red" and decedent felt extremely weak. Decedent's extreme obesity was also noted in the record.

While in St. Anthony's Hospital, decedent was seen by a pulmonary specialist, Dr. Zygmont Orzechowski, who also noted that a steering wheel rubbed on decedent's abdomen causing the pustules. One of his impressions was acute cellulitis of the abdomen possibly causing septic shock.

When decedent was hospitalized, Petitioner again observed his lower abdominal area and observed that the area of the sores began to turn black. Huch also visited decedent in the hospital and observed that the lower abdominal area had a crescent shape across it. Petitioner testified that for a brief period of time, decedent's condition improved; however, on one of her visits, decedent had difficulty breathing, attempted to get up out of bed and fell to the floor. Decedent had to be resuscitated and was returned to the ICU. A couple of days thereafter, decedent was totally unresponsive and comatose. He died on February 11, 2010. Dr. Kolli's note in the record stated that decedent has cellulitis due to an abdominal abscess and that decedent's death was because of septic shock.

Dr. Kolli was deposed on January 18, 2011, and her deposition testimony was received into evidence at trial. Dr. Kolli testified that she had treated decedent for a variety of health problems from August 1, 2007, until his death in February, 2010. Prior to decedent's hospitalization on January 29, 2010, Dr. Kolli had most recently seen him on September 24, 2009. At that visit, decedent weighed 268 pounds and had been gaining weight for the preceding several months. She did describe him as being obese. When Dr. Kolli saw decedent on January 29, 2010, she observed that he had several skin abscesses on the lower abdominal wall. She described the area as being fiery red and that it appeared "...like a crescentic area." Dr. Kolli opined that the cause of decedent's death was cellulitis of the abdominal wall and indicated this as being the cause of death on decedent's death certificate.

In regard to the issue of causality, Dr. Kolli testified in response to a hypothetical question that decedent's work activities, which included his lower abdominal wall being rubbed by the steering wheel of the lull, that this trauma could have caused or aggravated the cellulitis. On cross-examination, Dr. Kolli testified that she had reviewed the photographs of the lull and that she was familiar with the size and shape of decedent's body and that she was reasonably certain that his lower abdominal area would have come into contact with the steering wheel. Dr. Kolli also stated that the amount of infection and the location were very unusual and that it was unusual that it was limited to that specific area of the anatomy. Dr. Kolli further opined that a steering wheel rubbing back and forth across the stomach could cause a "mechanical trauma." Dr. Kolli reaffirmed her opinion that the cellulitis was either caused or aggravated by the contact between the lower abdominal wall and the steering wheel.

Dr. Kolli was questioned about whether poor hygiene on the part of decedent, which Respondent's counsel referred to as decedent's failure to seek medical care earlier, could have caused the cellulitis condition to spread. Dr. Kolli agreed that ignoring it could have caused her to spread. The medical records indicated that decedent had observed some abscesses several weeks prior, but it was not until they became "fiery red" and extremely symptomatic that he sought medical treatment.

John Bush, Respondent's Site Safety Manager, testified at the trial of this case and stated that he knew decedent and that decedent did have a very large lower abdominal area. Bush testified that he observed decedent operating the lull and that decedent's stomach did not come into contact with the steering wheel. Bush also stated that it would have been virtually impossible for someone to operate the lull if there stomach was in contact with the steering wheel because of the turning mechanism. He further testified that the lull operator's seat was adjustable.

Bush also took a number of photos that were introduced into evidence at trial. Some of the photos included measurements of the interior of the cab of the lull. There were a number of other photos which two other employees, Rodney Moss, and Jerry Bathon, were seated in the lull and neither of their lower abdominal areas came into contact with the steering wheel. One of the photos revealed that there was a gap between Moss' lower abdomen and the steering wheel of approximately six and one-half inches. A video showing Moss operating the lull was also received into evidence. Bush testified that Moss had a very similar physique to that of decedent and that the other employee, Jerry Bathon, also operated the lull and that his stomach did not come into contact with the steering wheel.

Petitioner's counsel recalled Huch to testify and he stated that he knew both Moss and Bathon and that decedent had a substantially larger lower abdominal area than what they did.

At the direction of Respondent, Dr. Stephen J. Schrantz, an infectious disease specialist and internist, reviewed decedent's treatment records. Dr. Schrantz's report of December 12, 2012, was received into evidence at trial. In regard to the steering wheel rubbing against Petitioner's lower abdominal area, Dr. Schrantz stated that "this is a plausible theory from a mechanism of injury viewpoint, but it is suspect regarding the amount of repeated injury that would have to be ignored in order to lead to this condition." Dr. Schrantz was not able to opine as to how a

steering wheel could cause the injury in this specific situation; however, he also commented that "any other chronic chafing could lead to a similar injury."

Conclusions of Law

In regard to disputed issues (C) and (F) the Arbitrator makes the following conclusions of law:

The Arbitrator concludes that the decedent, Michael Toon, sustained a repetitive trauma injury arising out of and in the course of his employment for Respondent that manifested itself on January 28, 2010.

The Arbitrator further concludes that as a result of the aforementioned repetitive trauma injury, Michael Toon died on February 11, 2010.

In support of these conclusions the Arbitrator notes the following:

The Arbitrator notes that the Application alleged a date of accident of February 3, 2010; however, Michael Toon's symptoms manifested themselves on January 28, 2010.

The testimony at trial of the witnesses, the testimony of Dr. Kolli and the medical records consistently noted that the decedent, Michael Toon, was extremely obese and had a very large lower abdominal area. Both Rebecca Toon and Connie Sauerwein described the deceased as being "pear-shaped."

The Arbitrator notes that the rubbing of the steering wheel of the lull on Michael Toon stomach area was consistently noted in the St. Anthony's medical records.

The Arbitrator finds the testimony of Merryl Huch to be more credible than the testimony of John Bush, in regard to decedent's physique and the fact that the steering wheel of the lull rubbed against decedent's lower abdominal area. Huch specifically testified that decedent's lower abdominal area was considerably larger than those of the two other employees, Moss and Bathon.

The Arbitrator finds the testimony of the treating physician, Dr. Kolli, to be credible in regard to the issue of causality. The Arbitrator also notes that Respondent's medical expert, Dr. Schrantz, was in agreement that the mechanism of injury was plausible.

In regard to disputed issue (K) the Arbitrator makes the following conclusion of law:

The Arbitrator finds that all of the medical services provided to Michael Toon were reasonable and necessary and that Respondent is liable for the payment of the medical bills incurred therewith.

Respondent shall pay reasonable and necessary medical services as identified in Petitioner's Exhibit 4 as provided in Sections 8(a) and 8.2 of the Act subject to the fee schedule.

In regard to disputed issue (O) the Arbitrator makes the following conclusion of law:

The Arbitrator concludes that the decedent, Michael Toon, did not engage in any insanitary or injurious practices.

In support of this conclusion the Arbitrator notes the following:

The unrebutted testimony was that Michael Toon would shower every day shortly after returning to his residence after work.

The medical records indicate that Petitioner had noticed some lesions in his lower abdominal area several weeks prior to January 28, 2010; however, the symptoms did not become severe and the appearance was not "fiery red" until that time. The fact that the decedent did not seek medical treatment prior to that time does not constitute an insanitary or injurious practice.

William R. Gallagher, Arbitrator

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

☐ Affirm and adopt (no changes)	☐ Injured Workers' Benefit Fund (§4(d))
☐ Affirm with changes	☐ Rate Adjustment Fund (§8(g))
☐ Reverse	☐ Second Injury Fund (§8(e)18)
	☐ PTD/Fatal denied
☒ Modify down	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Anthony Sansardo,
Petitioner,

vs. NO: 13 WC 05477

14IWCC0373

Benchmark Construction Company,
Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review under §19(b) having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issues of average weekly wage and penalties, and being advised of the facts and law, modifies the Decision of the Arbitrator as stated below and otherwise affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof. The Commission further remands this case to the Arbitrator for further proceedings for a determination of a further amount of temporary total compensation or of compensation for permanent disability, if any, pursuant to Thomas v. Industrial Commission, 78 Ill.2d 327, 399 N.E.2d 1322, 35 Ill.Dec. 794 (1980).

The Commission finds that Mr. Sansardo's overtime, in addition to his grease time, was mandatory and is to be included in his average weekly wage.

According to Section 10 of the Act,

> If the employee's employment began during the 52 week period, the earnings during employment are divided by 'the number of weeks and parts thereof' during which the employee actually earned wages.

According to Petitioner's exhibit A, Mr. Sansardo worked 46 days between Thursday, July 26, 2012 and Thursday, September 20, 2012, representing 9.2 weeks. His hourly rate of pay was $43.30. He worked 429.5 hours. His earnings during this period were $18,597.35. This yields an average weekly wage of $2,021.45.

The Commission further vacates the Arbitrator's award of penalties and finds that the Respondent's actions were not unreasonable or vexatious. The Respondent paid TTD benefits, but did not include overtime in its calculation. They did, however, include the mandatory grease time. In excluding overtime, the Respondent relied on the union contract, which was silent as to whether overtime was mandatory and Mark Atkins' testimony that overtime was voluntary. The exclusion of overtime was not unreasonable.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed on September 3, 2013 is hereby modified as stated above, and otherwise affirmed and adopted.

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent shall pay to the Petitioner the sum of $1,295.47 per week for a period of 45-2/7 weeks, that being the period of temporary total incapacity for work under §8(b), and that as provided in §19(b) of the Act, this award in no instance shall be a bar to a further hearing and determination of a further amount of temporary total compensation or of compensation for permanent disability, if any.

IT IS FURTHER ORDERED BY THE COMMISSION that this case be remanded to the Arbitrator for further proceedings consistent with this Decision, but only after the latter of expiration of the time for filing a written request for Summons to the Circuit Court has expired without the filing of such a written request, or after the time of completion of any judicial proceedings, if such a written request has been filed.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner interest under §19(n) of the Act, if any.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall have credit for all amounts paid, if any, to or on behalf of Petitioner on account of said accidental injury.

14IWCC0373

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $4,900.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED:

MAY 20 2014

Daniel R. Donohoo

Ruth W. White

Charles J. DeVriendt

drd/tdm
o- 03/19/14
68

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF 19(b) DECISION OF ARBITRATOR

SANSARDO, ANTHONY
Employee/Petitioner

Case# **13WC005477**

14IWCC0373

BENCHMARK CONSTRUCTION CO
Employer/Respondent

On 9/3/2013, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.06% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

A copy of this decision is mailed to the following parties:

0365 BRIAN J McMANUS & ASSOC LTD
30 N LASALLE ST
SUITE 2126
CHICAGO, IL 60602

2999 LITCHFIELD CAVO LLP
ROBERT LAMMIE
303 W MADISON ST SUITE 300
CHICAGO, IL 60606-3309

STATE OF ILLINOIS)
)SS.
COUNTY OF Cook)

☐ Injured Workers' Benefit Fund (§4(d))
☐ Rate Adjustment Fund (§8(g))
☐ Second Injury Fund (§8(e)18)
☒ None of the above

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

Anthony Sansardo
Employee/Petitioner

v.

Benchmark Construction Co.
Employer/Respondent

Case # 13 WC 05477

Consolidated cases: _____

14IWCC0373

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Molly Mason**, Arbitrator of the Commission, in the city of **Chicago**, on **August 2, 2013**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. ☐ Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. ☐ Was there an employee-employer relationship?
C. ☒ Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. ☐ What was the date of the accident?
E. ☐ Was timely notice of the accident given to Respondent?
F. ☐ Is Petitioner's current condition of ill-being causally related to the injury?
G. ☒ What were Petitioner's earnings?
H. ☐ What was Petitioner's age at the time of the accident?
I. ☐ What was Petitioner's marital status at the time of the accident?
J. Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services? **ISSUE DEFERRED**
K. ☒ Is Petitioner entitled to any prospective medical care?
L. ☒ What temporary benefits are in dispute?
☐ TPD ☐ Maintenance ☒ TTD
M. ☒ Should penalties or fees be imposed upon Respondent?
N. ☒ Is Respondent due any credit?
O. ☐ Other _____

FINDINGS

On the date of accident, **September 20, 2012**, Respondent *was* operating under and subject to the provisions of the Act.

On this date, an employee-employer relationship *did* exist between Petitioner and Respondent.

On this date, Petitioner *did* sustain an accident that arose out of and in the course of employment.

Timely notice of this accident *was* given to Respondent.

Petitioner's current condition of ill-being *is* causally related to the accident.

On the date of accident, Petitioner was **40** years of age, ***single*** with **0** dependent children.

The parties agreed to defer the issue of incurred medical expenses to a future hearing. T. 6.

Respondent shall be given a credit of **$53,800.35** for TTD, **$0** for TPD, **$0** for maintenance, and **$0** for other benefits, for a total credit of **$53,800.35**.

Respondent is entitled to a credit of **$0** under Section 8(j) of the Act.

ORDER

Respondent contested "arising out of" at the hearing but took accident out of dispute in its proposed decision. The Arbitrator finds that Petitioner sustained a compensable work accident on September 20, 2012. At the hearing, Respondent agreed that the Arbitrator should find causation if she found accident. Accordingly, the Arbitrator finds that Petitioner established causal connection.

For the reasons set forth in the attached decision, the Arbitrator finds that all of Petitioner's overtime was mandatory. Based on this finding, the Arbitrator includes all of Petitioner's overtime earnings (at a straight time rate) in her wage calculation and finds Petitioner's temporary total disability rate to be the applicable maximum, or $1,295.47 per week. The parties stipulated Petitioner was temporarily totally disabled from September 20, 2012 through the hearing of August 2, 2013. T. 5. The Arbitrator awards Petitioner temporary total disability benefits at the rate of $1,295.47 per week from September 20, 2012 through August 2, 2013, a period of 45 2/7 weeks. Respondent is to receive credit for the $53,800.35 in TTD it paid prior to the hearing, per the parties' stipulation. Arb Exh 1.

For the reasons set forth in the attached decision, the Arbitrator finds that Respondent acted in an objectively unreasonable manner in calculating Petitioner's average weekly wage and, based on that calculation, underpaying temporary total disability benefits. The Arbitrator further finds that Respondent is liable for Section 19(k) penalties in the amount of $888.36, Section 19(l) penalties in the amount of $9,510.00 and Section 16 attorney fees in the amount of $355.35.

Petitioner claimed prospective care at the hearing but withdrew this claim, for the time being, in his proposed decision. The Arbitrator denies Petitioner's claim for prospective treatment, without prejudice.

In no instance shall this award be a bar to subsequent hearing and determination of an additional amount of medical benefits or compensation for a temporary or permanent disability, if any.

RULES REGARDING APPEALS Unless a party files a *Petition for Review* within 30 days after receipt of this decision, and perfects a review in accordance with the Act and Rules, then this decision shall be entered as the decision of the Commission.

STATEMENT OF INTEREST RATE If the Commission reviews this award, interest at the rate set forth on the *Notice of Decision of Arbitrator* shall accrue from the date listed below to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

Molly C Mass
Signature of Arbitrator

9/3/13
Date

ICArbDec19(b)

SEP 3 - 2013

Anthony Sansardo v. Benchmark Construction Company
13 WC 5477

Discussion re Remaining Disputed Issues

On August 2, 2013, the Arbitrator conducted a hearing pursuant to Sections 19(b) and 8(a) of the Act. At that hearing, the parties placed a number of issues in dispute. Respondent agreed that Petitioner, a heavy equipment operator, sustained an accidental fall at a Respondent jobsite on September 20, 2012, but contended that this fall did not arise out of Petitioner's employment. Respondent also indicated it would not contest causation if the Arbitrator found in Petitioner's favor on the issue of accident. T. 6-7. Petitioner placed prospective care at issue and indicated he was seeking an award of psychiatric care and certain medication. Arb Exh 1. T. 5-6.

The parties narrowed the disputed issues in their proposed decisions. Respondent is no longer contesting accident and Petitioner is no longer seeking prospective care. Accordingly, the Arbitrator focuses on the remaining disputed issues of average weekly wage and penalties/fees. Petitioner claims a wage of $2,257.79, based on his argument that his overtime was mandatory. Petitioner also claims that Respondent is liable for penalties and fees based on its failure to include all overtime earnings in calculating his wage and paying temporary total disability. Respondent claims an average weekly wage of $1,787.67 based on its argument that only a limited portion of Petitioner's overtime, i.e., "grease time," was mandatory. Respondent also claims it is not liable for penalties and fees. Respondent agrees with the claimed period of temporary total disability, i.e., September 20, 2012 through the hearing of August 2, 2013. T. 5. Arb Exh 1.

Wage-Related Evidence

Petitioner testified he began working for Respondent about two months before his accident of September 20, 2012. T. 15. On September 20, 2012, he fell backward while on top of an excavator. He fell diagonally, about 7 or 8 feet, and landed on a steel bucket, striking his right upper back against the "teeth" of the bucket. T. 16. He was initially taken via ambulance to Christ Hospital, where he was diagnosed with several injuries, including multiple rib and vertebral fractures. On September 23, 2012, he was transferred to Northwest Community Hospital, where he stayed until October 1, 2012. T. 18-19. He was readmitted to Northwest Community Hospital on June 18, 2013. Dr. Regan performed a lumbar fusion during this re-admission. T. 20.

Petitioner testified he has been a member of Local 150, the AFL-CIO International Union of Operating Engineers, since about 1995 or 1996. T. 25. His union hall "dispatched" him on July 25, 2012 and instructed him to report to Respondent the following day. He first worked for Respondent on July 26, 2012, a Thursday. He continued working as a union operating engineer for Respondent until the accident. T. 25-26.

Petitioner testified he maintained a diary or log during the entire time he worked for Respondent. In his diary, he logged each job location and foreman. He also logged the machines he operated and the hours he worked each day. He testified he made entries in his diary at the end of each workday. T. 27. His primary purpose in maintaining the diary was to ensure he was being paid correctly. T. 27. He relied on the entries in the diary in testifying as to his assignments and hours before the accident.

Petitioner testified that, on July 26, 2012, he reported to a Respondent foreman named Eric at a jobsite at 55th and Damen. Eric did not tell him his normal work week would be Monday through Saturday. T. 30. Eric told him he would be operating a front end loader for two days, filling in for an operator who was absent. T. 31. Petitioner testified he operated the front end loader for 10 ½ hours each day on July 26 and 27. T. 28, 31, 36, 38. Petitioner testified that, as an operator rather than a foreman, he has no discretion as to when his workday ends. It is his foreman who makes that decision. He starts at 6:30 AM, begins digging at 7:00 AM and continues working until his foreman says he can stop. T. 37-38, 77.

Petitioner testified that, on Saturday, July 28, 2012, he operated a Caterpillar 314 at a jobsite on Wacker Drive at the direction of a foreman named Richie. T. 38-39. Petitioner testified he operated this machine for 8 ½ hours that day, with the ½ hour representing "grease time" at time and a half per the collective bargaining agreement. Petitioner explained that, when he operated certain types of "Class 1" equipment for eight hours, he was automatically entitled to an extra half hour of "grease time." T. 39, 67.

Petitioner testified he next worked for Respondent on Monday, July 30, 2012. On that day and the next, he again operated a Caterpillar 314 at the Wacker Drive site, under Richie's direction. On each of those days, he operated the Caterpillar 314 for 8 ½ hours, including "grease time." T. 40.

Petitioner testified that, on August 1st, 2nd and 3rd, he operated a JCB excavator at a jobsite at 55th and Prairie. His foreman at that site was Raphael. On August 1st and 2nd, he worked 9 hours per day, including "grease time." On Friday, August 3rd, he worked 8 ½ hours, including "grease time." T. 42-43.

Petitioner testified he did not work on Saturday, August 4th. On Monday, August 6th, he began working at a jobsite at 119th and Harvard. He operated a Komatsu 138 excavator at this site. Jorge Cantu was his foreman. Cantu told him when his workday ended. He was "just there to run the machine." T. 45. On August 6th, he worked 9 hours, including "grease time." On August 7th, he worked 9 ½ hours, including "grease time." On August 8th, he continued operating the same excavator but at a different location, 119th and Yale. Cantu was still his foreman. He worked 9 hours, including "grease time," that day. T. 45. On Thursday, August 9th, he continued operating the excavator at 119th and Yale. He worked 10 ½ hours that day, including "grease time." In his diary, he wrote "owes one," meaning that Cantu owed him an extra hour from Monday, August 6th, when he had actually worked 10 rather than 9 hours due to it taking time for the newly formed crew to "gel." T. 46-47.

Petitioner testified he continued operating the same excavator thereafter, until September 7, 2012 (with the exception of Labor Day), at which point he began operating both the excavator and a bobcat. Cantu remained his foreman during the entire period between August 6, 2012 and the accident. Petitioner testified he was the only operator on this crew. The crew consisted of him, Cantu, two laborers and a pipefitter. T. 47-48.

Petitioner testified he alternated, or "jumped," between the excavator and bobcat all day on September 7th, even though the union contract allows only one "jump" per workday. He "jumped" back and forth on September 7th because he enjoyed the work and did not want to cause any trouble for Cantu. Even though he "jumped," he was entitled to "grease time" on September 7th because the excavator qualified as a "grease time" piece of equipment. T. 51.

Petitioner's job diary, PX A, was admitted into evidence, with Respondent waiving hearsay. T. 59.

Petitioner identified PX B as a group of all the paychecks he received from Respondent prior to the accident. T. 61. Of the weeks he worked before the accident, the first and last weeks were partial. T. 61. Respondent always paid him at the rate of $43.30 per hour. T. 61. PX B was admitted into evidence, with Respondent waiving hearsay. T. 62.

Petitioner identified PX C as a group of all the paychecks he received from Respondent other than the paychecks covering the first and last weeks. T. 64. PX C was admitted into evidence, with Respondent waiving hearsay. T. 65.

Petitioner identified PX D as the union contract. Petitioner testified he is familiar with parts of this contract. T. 66. Petitioner testified that, if he is the only operator at a jobsite, and the work at that site is going to continue beyond eight hours, he cannot abandon his machine. T. 66. If he did this, he would be replaced. If he told the employer in advance that he had to leave after eight hours, he is not sure what would happen. There have been times when the work at a site has come to a standstill because he had to leave at the eight-hour point and there was no other operator at the site. T. 67. As soon as he starts a machine at a site, he is entitled to 8 ½ hours of pay, even if he does not work that long, assuming the machine he is operating is a "Class 1" machine. If he left a site at the eight-hour point and the company called in another operator to take over for him on a "Class 1" piece of equipment, that replacement operator would be entitled to 8 ½ hours of pay. T. 67. The Arbitrator admitted PX D into evidence, with Respondent waiving hearsay. T. 71.

Petitioner's counsel identified PX E as a group of letters he sent to Respondent's counsel between May 9 and June 30, 2013, claiming an underpayment of temporary total disability benefits and asking Respondent to correct the underpayment. T. 68-69. The Arbitrator admitted PX E into evidence, with Respondent waiving hearsay. T. 72.

Petitioner acknowledged speaking with Stephanie Bolen, the adjuster, concerning the issue of overtime. Petitioner testified he spoke with Bolen via telephone on the second or third day he was in the hospital. He had so much medication in him he cannot completely recall the conversation. He asked Bolen if she would be recording the conversation. Bolen replied, "yes." He then told Bolen he respectfully declined to give a recorded statement. He recalls Bolen telling him that Respondent would have accommodated him had he wanted to leave a jobsite after working for eight hours. T. 77. He could not recall whether he told Bolen the overtime he performed was voluntary. T. 77-78.

Petitioner testified that Jorge Cantu never told him he could leave at the eight-hour point and Respondent would arrange for a replacement. On some days, he questioned Cantu as to what their goal was and how long they were likely to work. T. 78. Cantu told him and the other crew members their goal was to perform "20 water services per day." Each water service consisted of disconnecting the existing service and tying on the new service. Work-wise, this involved excavating a trench, getting down to the existing water main, putting in the new water main, dropping a trench box if the hole was deeper than 4 or 5 feet and having a laborer and plumber get in the hole to disconnect the old service and tap into the new service. Once this was accomplished, they would move on to the next house. T. 79.

Petitioner testified his crew met Cantu's goal on only one day, the Friday before his accident. Petitioner testified they were able to meet the goal that day only because they had three trucks available to them. That enabled him to excavate directly into a truck. On every other day, they had only one truck available, which meant he had to "move [his] spoil" twice. Petitioner testified it is impossible to complete 20 water services in eight hours if only one operator and one truck are available. T. 80-81.

Petitioner testified that, during the period he worked for Respondent, he worked with another operator only the first two days. Thereafter, he was the only operator and worked only with his own crew. He did not know what other Respondent operators might have done, work-wise, after the first two days. T. 89-90.

Petitioner testified he underwent therapy, four epidural injections and two SI joint injections before ultimately undergoing back surgery. T. 81. Respondent's various Section 12 examiners agreed with the surgical recommendation. Respondent authorized and paid for the surgery. T. 87. Petitioner was wearing a back brace as of the hearing. To his recollection, Dr. Regan, his surgeon, prescribed this brace. T. 82-83. Dr. Regan does not want him to re-start therapy until November of 2013. T. 84. He is scheduled to return to Dr. Regan on August 9, 2013. Since the accident, no physician has released him to work. T. 92-93. He remains under active medical treatment. T. 93.

Under cross-examination, Petitioner testified he insisted on being transferred from Christ Hospital to Northwest Community Hospital. He insisted on this because Christ Hospital was far from his home and his doctors were on staff at Northwest Community. T. 95-96. He had taken Norco at his doctor's recommendation at some point prior to the work accident but

"was not taking any narcotics" on the day of the accident. T. 96. He had not worked for about two weeks as of July 25, 2012, the day his union hall "dispatched" him to Respondent. T. 97. Between August of 2011 and July 14, 2012, he worked for NPL. When a job ends, you call "dispatch" to put yourself back on the "out of work" list. When you call, you are put at the end of the list. T. 99.

Petitioner acknowledged he could have worked on Kedzie rather than Damen on July 26th. He knows the cross street was 55th. He does not live in Chicago. He is positive he made an entry in his diary at the end of each workday. T. 100. The "grease time" he is paid for operating certain types of equipment is mandatory overtime per the union contract. The contract does not otherwise speak to the issue of mandatory overtime. T. 101. He contends that his non-grease time overtime was mandatory even though the contract does not characterize it as such. He bases this on his experience. If he is in the middle of a dig and has guys working in an 11-foot hole at the eight-hour point, he cannot simply leave. If he were to do so, he would not have a job the next day. T. 102. He acknowledged that his non-grease time overtime hours were irregular. Each workday is different. On some jobs, he has to finish up by putting a plate over a hole for safety reasons. T. 103-104.

On redirect, Petitioner reiterated he was not on Norco when the accident occurred. He recalled having his blood drawn for testing after he arrived at the hospital, following the accident. T. 108. He probably used his asthma inhaler on the day of the accident, before the accident occurred, but that did not affect his ability to work. T. 112. He has been an asthmatic for over twenty years. T. 106. The accident took place between 2:00 and 2:30 PM. He worked several hours before the accident. T. 113. He did not take any Norco between the time he got up that morning and the time the accident occurred. T. 113.

Jorge Cantu testified on behalf of Petitioner, pursuant to subpoena. PX G. Cantu denied discussing the claim with Petitioner's counsel or Respondent's witnesses prior to testifying. T. 119-120.

Cantu testified he was Petitioner's foreman between August and September 20, 2012. He ran a 5-man crew during this period. Petitioner was the only operator on this crew. T. 121. Cantu testified as follows about the length of Petitioner's workday:

> "Q: Did [Petitioner] have to work until the job was finished every day, sir?
>
> A: Yes.
>
> Q: And that was your instructions to him?
>
> A: To [Petitioner]?
>
> Q: Yes.

A: Yes.

Q: Now, many times he worked over 8 hours, correct?

A: Correct.

Q: And he worked more than 8 hours because he had to stay until the job was finished, correct?

A: Until the equipment is not used. If we have to do just something light or something, we dismiss, you know, [Petitioner] could go.

Q: If you were still in need of an operator, he had to stay until it was finished, correct?

A: Yes, if we need an operator, yes."

T. 122-123.

Cantu testified he tried to have his crew complete as many water services as possible each day. He wanted to complete eight to twelve per day, "fifteen if [he] could." T. 123. Petitioner showed up every day and did his job "okay." T. 124. Most days they only had one truck available that Petitioner could dump his excavations into. Cantu did not recall having three trucks available on a day shortly before the accident. T. 125. His crew never completed twenty water services in one day. T. 126. Petitioner operated an excavator and sometimes a bobcat. There were no days when Petitioner alternated between these pieces of equipment many times because Cantu operated the bobcat most of the time. T. 126-127.

Cantu testified he is a member of Local 2, the laborers union. He is not a member of Local 150, the operating engineers union. As of August 2013, he will have worked one year for Respondent. T. 127. Cantu admitted being told he was not supposed to operate a bobcat since he is not a Local 150 member. Despite this, he operated the bobcat "a bunch of times." T. 128-129.

Under cross-examination, Cantu testified he does not know what the operating engineers' contract provides with respect to overtime. T. 129. Regardless, he told Petitioner he had to work overtime to complete the work from time to time. T. 129. No one affiliated with Respondent told him that his crew members could not leave work at the eight-hour point and had to stay until the work was finished. T. 130.

On redirect, Cantu reiterated that Petitioner was the only operator on his crew in August and September of 2012. Petitioner had to stay past the eight-hour point if work remained to be done. T. 131.

Under re-cross, Cantu could not recall any instance where he called a substitute operator to finish the work because Petitioner had to leave. T. 132-133.

Stephanie Bolen, a senior claims adjuster with Third Coast Underwriters, testified on behalf of Respondent. Bolen testified that Respondent was her client as of Petitioner's accident. T. 136. On September 25, 2012, she spoke with Petitioner via telephone. She believes Petitioner called her that day. T. 136. Petitioner called her because he wanted to be transferred from Christ Hospital to Northwest Community Hospital, which was closer to his home. T. 137. She attempted to take a recorded statement from Petitioner at that time. Petitioner declined to give a recorded statement but indicated he would answer her questions. T. 137. She took detailed notes of this conversation while she was speaking with Petitioner. She identified RX 2 as her notes. T. 138. She asked Petitioner about the accident and about his earnings. Petitioner told her he is a Local 150 member and his hourly rate of pay is $43.40. Petitioner also told her he receives time and a half "for anything over eight hours." T. 139. She asked Petitioner if overtime was voluntary or mandatory and he indicated it was voluntary. T. 139.

Under cross-examination, Bolen acknowledged speaking with Petitioner several times. T. 140. Over Respondent's objection, she testified she followed up with Respondent after speaking with Petitioner about overtime. She obtained a wage statement from Respondent. She inquired about overtime and "was told that [Local] 150 operators get a mandatory half hour daily" of what is called "grease time." She included this mandatory overtime in her calculation of Petitioner's average weekly wage. She believes she discussed the overtime situation with Donna Cibelli, her contact person at Respondent. T. 144. She assumed Petitioner worked Monday through Friday and that he thus worked 42 ½ hours per week, including the mandatory "grease time." She believes she multiplied 42 ½ hours by $43.40, after verifying Petitioner's hourly rate with Respondent. She assumes, based on her handwritten notes, that Petitioner told her he worked 52 to 58 ½ hours per week and that he started at 6:30 AM and stayed until the work was done. T. 146-147. She did not call Petitioner's foreman, Jorge Cantu, to verify this. She talked with Respondent and obtained a wage statement. T. 147. She recalled receiving letters from Petitioner's counsel claiming an underpayment. She also recalled receiving Petitioner's paychecks. T. 147. PX B.

Mark Atkins, Jr. also testified on behalf of Respondent. Atkins testified he works as a project manager for Respondent. T. 153. He is familiar with the operating engineers contract. PX D. Article 8, Section 1 of the contract provides that, when an operator uses certain kinds of equipment, he is entitled to a half hour of pay at time and a half in order to grease/maintain that equipment. T. 154. That extra time is mandatory overtime. T. 154. The contract does not contain any other provision concerning mandatory overtime. T. 155. Respondent does not require any mandatory overtime of its operators other than the mandatory "grease time." T. 156.

Under cross-examination, Atkins testified that Cantu was in charge of the crew that Petitioner worked on. He was present in the courtroom during Cantu's testimony. He never worked on Cantu's crew. He visited the jobsites that Petitioner worked at. Typically, he stays at any one jobsite for about fifteen to twenty or thirty minutes. The work that he does at a jobsite is purely supervisory. T. 157-158. He has no reason to disagree with the overtime hours reflected on Petitioner's paychecks. T. 158-159. He does not know whether only one truck was available at the sites where Petitioner worked. He can say that Cantu typically orders one truck for the work he performs. T. 159. If a Respondent operator had to leave at the eight-hour point and he had to obtain a replacement operator from the union hall, he would have to pay that replacement operator eight and a half hours. Typically, however, he is able to obtain a replacement operator from one of his other crews. Respondent generally has eight to ten crews working, mainly on the south side. He would call another crew and get an operator to cover for an hour or two at the end of the workday. He never did this during the time that Petitioner worked on Cantu's crew. T. 160. He has never been unable to find a replacement operator from another Respondent crew because most Respondent employees "jump at" the chance to perform overtime. T. 161. It is he, rather than a foreman, who is supposed to arrange for a replacement. It could happen that a Respondent foreman would delve into personnel issues but that is not normal procedure. T. 161.

On redirect, Atkins testified that Petitioner never asked him if he could leave at the eight-hour point. T. 162.

Under re-cross, Atkins acknowledged calling Petitioner when Petitioner was in the hospital following the accident. He told Petitioner he thought he was a good employee. It is his impression that Petitioner is currently unable to work. T. 162.

On rebuttal, Petitioner reiterated he had more than one truck available to him on only one day, the Friday before his accident. It was on this day that he and the other members of Cantu's crew completed twenty water services. The following week, the superintendent, Barney, told them they were "one shy of the company record last Friday." T. 165.

Under cross-examination, the following exchange took place:

> Q: Did you ever seek to leave at the end of 8 hours for any emergency or anything like that?
>
> A: There was days that I needed to take care of stuff at home where I'd ask Jorge if we can maybe have an early day for personal matters. But other than that, at the time [Respondent] had so much work and I was happy to work it.
>
> Q: But you were able to get the day when you requested it, correct?

A: Oh, yes, if I needed to get a day off, absolutely, not a day off but to leave early after 8 hours, sure."

T. 165.

On redirect, Petitioner testified he could not recall exactly how often he left early but he knew there were "not many" occasions when this occurred. On those occasions, he was "able to go" once he had parked his trench boxes and machine and plated up the machine. The other members of his crew would still have work to do at that point but he would be finished. His duties revolved solely around operating the equipment. If, however, his required operator duties were not finished at the eight-hour point he had to stay until he finished. T. 167.

Under re-cross, Petitioner acknowledged he enjoyed the overtime pay. T. 167.

Respondent offered into evidence RX 4, the check register that Bolen testified she relied on in calculating Petitioner's average weekly wage. The parties stipulated that Bolen made the handwritten notes that appear on RX 4. T. 183. RX 4 reflects the straight time and overtime earnings Petitioner received from Respondent between July 30, 2012 and September 20, 2012. RX 4 reflects the date of each paycheck and the hours Petitioner worked. With the exception of the last week of employment, RX 4 does not reflect the exact dates on which Petitioner worked.

Respondent also offered into evidence RX 5, a check register pertaining to a different Respondent employee. This check register covers the period January 1, 2012 through January 4, 2013. Respondent offered RX 5 as the wage records of a "comparable" employee, pursuant to the fourth method of wage calculation set forth in Section 10 of the Act. Section 10 describes the circumstances under which a comparable employee's wages are to be considered:

> "Where by reason of the shortness of the time during which the employee has been in the employment of his employer or of the casual nature or terms of the employment, it is impractical to compute the average weekly wages as above defined, regard shall be had to the average weekly amount which, **during the 52 weeks previous to the injury, illness or disablement was being or would have been earned by a person in the same grade employed at the same work for each of such 52 weeks for the same number of hours per week by the same employer."**

[emphasis added]. The Arbitrator sustained Petitioner's objection to the admission of RX 5 and marked RX 5 as a rejected exhibit. T. 186-188. The Arbitrator does not view Petitioner's employment by Respondent as casual. Petitioner was a union employee. The parties agree on all wage-related issues other than the narrow issue of whether his non-grease time hours

should be included in calculating his wage. Petitioner's pre-accident employment by Respondent was relatively brief but there is no lack of information concerning his earnings. The Arbitrator further notes that the earnings set forth in RX 5 do not cover the 52 weeks preceding Petitioner's September 20, 2012 accident. Rather, they cover the calendar year 2012.

CONT'D

Anthony Sansardo v. Benchmark Construction
13 WC 5477

Arbitrator's Conclusions of Law

Did Petitioner sustain an accident on September 20, 2012 arising out of and in the course of his employment by Respondent? Did Petitioner establish causal connection?

At the hearing, Respondent acknowledged Petitioner fell at a jobsite on September 20, 2012 but maintained this fall did not arise out of Petitioner's employment. T. 7. Respondent took the position that the fall resulted from Norco usage. Petitioner denied using Norco as of the accident.

In its proposed decision, Respondent took accident out of dispute and acknowledged there were no toxicology studies in the initial hospital records other than a negative blood alcohol test result. PX 1, p. 22 out of 85.

Based on the foregoing, the Arbitrator views accident as a now-stipulated issue. The Arbitrator finds that Petitioner sustained a compensable work accident on September 20, 2012. The Arbitrator also finds in Petitioner's favor on the issue of causation, noting that, at the hearing, Respondent's counsel stated the Arbitrator should find in Petitioner's favor on the issue of causal connection if she found accident. T. 6.

What is Petitioner's average weekly wage? What is Petitioner's TTD rate? Was there a TTD underpayment? Is Respondent liable for penalties and fees?

As stated at the outset, Respondent agrees that Petitioner's hourly rate was $43.40 and that Petitioner was entitled to mandatory "grease time" overtime, i.e., a half hour at time and a half, after eight hours if he used certain equipment that required greasing. The dispute lies in whether the non-grease time overtime, which was substantial but varying, was also mandatory and includable in the calculation of Petitioner's wage.

In attempting to arrive at Petitioner's average weekly wage, the Arbitrator has compared Petitioner's testimony and diary entries concerning the dates and hours he worked against Respondent's check register (RX 4) and accompanying handwritten notes by Bolen. The Arbitrator notes that, while RX 4 states the date of each paycheck and the amount of regular and overtime hours Petitioner worked each week, it does not reflect the exact dates on which Petitioner worked. Nor does it reflect which of the many listed overtime hours represent mandatory "grease time" overtime hours. The handwritten notes on RX 4 reflect that Bolen arrived at an average weekly wage of $1,787.67 by taking earnings of $12,513.71 [$1,840.25 (representing 40 regular hour and 2.5 overtime hours @ $43.40) multiplied by 6 plus $1,472.20] and dividing those earnings by 7, representing 7 weeks. It appears to the Arbitrator that Bolen

did not include any of Petitioner's earnings from the first and last weeks of employment in her calculation, even though those earnings are reflected on RX 4, PX B and PX C. Bolen offered no explanation for this at the hearing.

Initially, the Arbitrator calculates wage without giving consideration to the non-grease time overtime. The Arbitrator arrives at total earnings of $14,727.11 by adding $737.80 (representing 17 hours at straight time) for the first week of employment, during which Petitioner worked two weekdays (per RX 4) on a piece of equipment that entitled him to grease time and $1,475.60 (representing 32 hours at straight time) for the last week of employment (i.e., through 9/20/12), during which Petitioner worked four days on a piece of equipment that entitled him to grease time, to $12,513.71 [$737.80 + $1,475.60 + $12,513.71 = $14,727.11]. The Arbitrator divides $14,727.11 by 8 rather than 7 because the evidence supports the conclusion Petitioner worked a total of about 8 rather than 7 weeks. [RX 4 reflects that Petitioner worked 40 days through September 20, 2012. In its proposed decision, Respondent agrees that Petitioner's work week consisted of 5 days. 40 divided by 5 equals 8.] The result is $1,840.88. When $1,840.88 is divided by 2/3, the result is $1,227.25. When $1,227.25 is multiplied by 45 2/7 weeks, the stipulated TTD period, the result is $55,577.03.

The Arbitrator turns to the issue of whether the non-grease time overtime was mandatory. Petitioner maintains that, in those instances where the machine he was operating was still in use at the 8-hour point, he was not free to simply shut the machine off and leave work. He testified that, had he abandoned his machine at a point where his crew members were working in a deep hole of his creation, he would not have had a job the next day. T. 102. Petitioner's foreman, Jorge Cantu, confirmed that Petitioner had to continue operating his assigned machine "until the job was finished." T. 121-122. Cantu also confirmed that his goal was to have his crew complete as many water services as he could per day. T. 123. He did not recall any instance where he had to request another operator to replace Petitioner. T. 132-133. Bolen testified that Petitioner told her his overtime was voluntary. Bolen further testified that she discussed Petitioner's earnings with Respondent and learned that "grease time" was in fact mandatory. Bolen indicated she included Petitioner's "grease time" in her wage calculation. T. 144. Atkins testified that "grease time" is the only mandatory overtime addressed in the union contract. T. 154-155. Atkins further testified that Respondent does not require any overtime other than the "grease time" specified in the contract. T. 156. Atkins acknowledged that Petitioner worked many overtime hours for Respondent, with those hours varying from week to week, that Petitioner was the only operator on Cantu's crew and that Cantu typically ordered only one truck. Atkins also acknowledged he never had to arrange for a replacement operator on Cantu's crew during Petitioner's tenure. T. 160, 162. He indicated he would typically have no difficulty arranging for such a replacement since his employees "jump at" overtime. T. 160.

In Freesen, Inc. v. Industrial Commission, 348 Ill.App.3d 1035, 1042 (4th Dist. 2004), the Appellate Court held that the Commission erred in including overtime earnings in calculating wage where there was no evidence that: "1) [the claimant] was required to work overtime as a condition of his employment; 2) he consistently worked a set number of overtime hours each

week; or 3) the overtime hours he worked were part of his regular hours of employment." [emphasis added] The Arbitrator, having considered the foregoing testimony and the wage-related documents, finds that Petitioner was required to work overtime as a condition of his employment and as a result of the unique nature of the skills he brought to the job. Cantu's crew included only one operator. Cantu's crew was charged with the task of removing old water services and installing new ones. Petitioner's operator/excavator skills allowed this task to be accomplished. Petitioner's co-workers could not "get in a hole" to do the changeover unless and until a hole was created. If the changeover was still in progress at the 8-hour point, Cantu would not let Petitioner leave. Nor would safety concerns have allowed Petitioner to leave without "buttoning up" the street by placing a plate over the hole. T. 103. See Weyker v. Imperial Crane Service, 2008 Ill.Wrk.Comp. LEXIS 925 and Mazurkiewicz v. City of Chicago/Department of Aviation, 2012 Ill.Wrk.Comp. LEXIS 562.

Based on RX 4 and the calculations set forth in PX C and D, the Arbitrator finds that inclusion of all of Petitioner's overtime earnings creates a wage giving rise to the maximum applicable temporary total disability rate of $1,295.47.

The Arbitrator turns to the issue of whether there was an underpayment of benefits. The Arbitrator finds there was an underpayment regardless of whether all overtime, or only the "grease time," is included in the wage calculation. The parties agree that Respondent paid $53,800.35 in TTD benefits prior to trial. As stated above, when a TTD rate of $1,227.25 is multiplied by 45 2/7 weeks, the stipulated TTD period, the result is $55,577.03. When the applicable maximum TTD rate of $1,295.47 is multiplied by 45 2/7, the result is $58,666.27.

The Arbitrator turns to the issue of whether Respondent is liable for penalties and fees. Petitioner maintains that Respondent acted in an objectively unreasonable manner in failing to consider all of his overtime hours and pay benefits at the applicable maximum rate. Respondent contends it is not liable for penalties or fees, arguing that it included the mandatory "grease time" overtime in its wage calculation.

The Arbitrator takes a somewhat different view. The Arbitrator finds that Respondent acted in an objectively unreasonable manner in failing to include all of Petitioner's regular and mandatory "grease time" earnings in its wage calculation. RX 4, considered in the context of Bolen's testimony, makes it clear that Bolen failed to consider all of Petitioner's "actual earnings" and the "weeks and parts thereof" per Section 10. Bolen did not include Petitioner's regular and "grease time" earnings from July 26 and 27, 2012 and from September 17 through September 20, 2012. Had Bolen included these earnings, and divided the total by 8 weeks, she would have arrived at a TTD rate of $1,227.25, as demonstrated above. The Arbitrator elects to award penalties and fees on the difference between $55,577.03 [$1,227.25 x 45 2/7 weeks] and $53,800.35, i.e., $1,776.73. The Arbitrator awards Section 19(k) penalties in the amount of $888.36 [50% of $1,776.73] and Section 16 attorney fees in the amount of $355.35 [20% of $1,776.73]. The Arbitrator also awards Section 19(l) penalties in the amount of $9,510.00 [$30.00/day multiplied by the 317 days that passed between September 20, 2012 and the

hearing of August 2, 2013.]

Is Petitioner entitled to prospective care?

At the hearing, Petitioner indicated he was claiming prospective care, i.e., a psychiatric evaluation, per Section 8(a). T. 6. Arb Exh 1. In his proposed decision, Petitioner acknowledged the evidence he produced at the hearing did not support this claim. The Arbitrator denies Petitioner's claim for prospective care, without prejudice.

STATE OF ILLINOIS)
) SS.
COUNTY OF KANE)

☒ Affirm and adopt (no changes)	☐ Injured Workers' Benefit Fund (§4(d))
☐ Affirm with changes	☐ Rate Adjustment Fund (§8(g))
☐ Reverse Choose reason	☐ Second Injury Fund (§8(e)18)
	☐ PTD/Fatal denied
☐ Modify Choose direction	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Marque M. Smart,
Petitioner,

vs. NO. 12 WC 08366

14IWCC0374

Central Grocers,
Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by Petitioner and Respondent herein and notice given to all parties, the Commission, after considering, the issues of the nature and extent of Petitioner's disability and penalties and attorneys' fees for Petitioner, and permanent partial disability, average weekly wage, and impairment rating for Respondent and being advised of the facts and law affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed on January 14, 2013 is hereby affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner interest under §19(n) of the Act, if any.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall have credit for all amounts paid, if any, to or on behalf of Petitioner on account of said accidental injury.

14IWCC0374

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $36,400.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: MAY 20 2014

Daniel R. Donohoo

o-03/19/14
drd/wj
68

Charles J. DeVriendt

DISSENT

I do not believe the Arbitrator had the authority to determine permanent partial disability because no impairment rating based on the AMA Guides was submitted into evidence. Accordingly, I respectfully dissent from the affirmation of that award by the majority. P.A. 97-18, the Workers' Compensation reform legislation enacted in 2011, added the new section 8.1b, which established that the AMA Guides regarding impairment shall be considered in the determination of permanent partial disability. The new section provides (emphasis added):

"For accidental injuries that occur on or after September 1, 2011, permanent partial disability **shall** be established using the following criteria:

(a) A physician licensed to practice medicine in all of its branches preparing a permanent partial disability impairment report shall report the level of impairment in writing. The report shall include an evaluation of medically defined and professionally appropriate measurements of impairment that include, but are not limited to: loss of range of motion; loss of strength; measured atrophy of tissue mass consistent with the injury; and any other measurements that establish the nature and extent of the impairment. The most current edition of the American Medical Association's "Guides to the Evaluation of Permanent Impairment" shall be used by the physician in determining the level of impairment.

(b) In determining the level of permanent partial disability, the Commission shall base its determination on the following factors: (i) the reported level of impairment pursuant to subsection (a); (ii) the occupation of the injured employee; (iii) the age of the employee at the time of the injury; (iv) the employee's future earning capacity; and (v) evidence of disability corroborated by the treating medical records. No single enumerated factor shall be the sole determinant of disability. In determining the level of disability, the relevance and weight of any factors used in addition to the level of impairment as reported by the physician must be explained in a written order."

It is cardinal rule of statutory construction that the word "shall" is mandatory, as opposed to the word "may" which is directory. *See, Schultz v. Performance Lighting, Inc., 984 N.E.2d 569* (2nd Dist. 2013). In addition, in debate in the Senate, the sponsor of the bill, Senator Kwami Raoul, informed the body (emphasis added):

"For the first time ever, the State of Illinois will be embracing the AMA's guidelines with regards to rating impairment. So the Illinois Workers' Compensation Act will have a provision in there that says physicians' impairment shall be rated by physicians that are certified to apply AMA guidelines to rate impairment and that will be the only way that rating of impairment will take place within the Illinois Workers' Compensation System. Thereafter, **rating of disability by arbitrators will take into account the rating impairment**, the occupation of the injured employee, the age of the injured employee, and the employee's future earning capacity and finally, evidence of disability corroborated by the treating medical records."

In addition, although the language of the new section specifies that no single factor shall be the sole factor in establishing determining permanent partial disability, the section also specifies that "the relevance and weight of any factors used in addition to the level of impairment as reported by the physician must be explained in a written order." That provision does not apply to any other of the specified factors. Therefore, while the impairment rating is not the exclusive factor, it is a factor of such importance that the relevance and weight of any other factor must be "explained in a written order." That language indicates to me that the General Assembly intended the impairment rating to be a fundamental basis for a disability award and deviation from that rating shall be explained. In my opinion the impairment rating becomes a preeminent piece of evidence, similar to a proper utilization review report, which presumptively absolves an employer from the imposition of penalties and fees if it acts in accordance with the report.

Finally, I believe the interpretation of the new section 8.1b is of sufficient importance that it should be addressed by the Appellate Court or the General Assembly. I hope this dissent brings this issue to their attention for possible clarification or amendment. For these reasons, I respectively dissent from the decision of the majority.

Ruth W. White

Ruth W. White

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

SMART, MARQUE
Employee/Petitioner

Case# **12WC008366**

CENTRAL GROCERS
Employer/Respondent

14IWCC0374

On 5/29/2013, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.08% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

A copy of this decision is mailed to the following parties:

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3998 ROSARIO CIBELLA LTD
LAURA D HRUBEC
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STATE OF ILLINOIS)
)SS.
COUNTY OF Cook)

☐ Injured Workers' Benefit Fund (§4(d))
☐ Rate Adjustment Fund (§8(g))
☐ Second Injury Fund (§8(e)18)
☒ None of the above

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

Marque Smart
Employee/Petitioner

v.

Central Grocers
Employer/Respondent

Case # 12 WC 8366

Consolidated cases:

14IWCC0374

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Gregory Dollison**, Arbitrator of the Commission, in the city of **Geneva, IL**, on **February 13, 2013**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. ☐ Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. ☐ Was there an employee-employer relationship?
C. ☒ Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. ☐ What was the date of the accident?
E. ☐ Was timely notice of the accident given to Respondent?
F. ☐ Is Petitioner's current condition of ill-being causally related to the injury?
G. ☒ What were Petitioner's earnings?
H. ☐ What was Petitioner's age at the time of the accident?
I. ☐ What was Petitioner's marital status at the time of the accident?
J. ☐ Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. ☒ What temporary benefits are in dispute?
☒ TPD ☐ Maintenance ☒ TTD
L. ☒ What is the nature and extent of the injury?
M. ☒ Should penalties or fees be imposed upon Respondent?
N. ☐ Is Respondent due any credit?
O. ☒ Other __The need for an impairment rating_____

FINDINGS

On 1/11/12, Respondent *was* operating under and subject to the provisions of the Act.

On this date, an employee-employer relationship *did* exist between the Petitioner and Respondent.

On this date, the Petitioner *did* sustain an accident that arose out of and in the course of employment.

Timely notice of this accident *was* given to Respondent.

Petitioner's current condition of ill-being *is* causally related to the accident.

In the year preceding the injury, the Petitioner earned $51,480.00; the average weekly wage was $990.00

On the date of accident, Petitioner was 40 years of age, ***single*** with 2 children under 18.

Respondent ***has not*** paid all reasonable and necessary charges for all reasonable and necessary medical services.

Respondent shall be given a credit of **$23,833.63** for TTD, $0.00 for TPD, $0.00 for maintenance, and $0.00 for other benefits, for a total credit of **$23,833.63**.

Respondent is entitled to a credit of $0.00 under Section 8(j) of the Act.

ORDER

Respondent shall pay Petitioner temporary partial disability benefits of **$577.50** commencing **1/24/2012** through **2/16/2012**, as provided in Section 8(a) of the Act.

Respondent shall pay Petitioner temporary total disability benefits of **$660.00**/week for **41-2/7** weeks, commencing **2/17/2012** through **12/2/2012**, as provided in Section 8(b) of the Act.

Respondent shall pay reasonable and necessary medical services, pursuant to the medical fee schedule, of $145.32 to Physician's Immediate Care, $739.30 to Midwest Orthopedics at RUSH, $1,223.34 to Instant Care, $1,855.00 to Advance Physical Medicine and $5,110.08 to Accelerate Rehabilitation as provided in Sections 8(a) and 8.2 of the Act. Consistent with the stipulation of the parties, Respondent shall receive a credit for all bills paid.

Arbitrator finds that Respondent shall pay Petitioner permanent partial disability benefits of **$594.00** per week for **125** weeks because the injuries sustained caused **25%** loss to the Person as a Whole as provided in Section 8(d)(2) of the Act.

RULES REGARDING APPEALS Unless a party files a *Petition for Review* within 30 days after receipt of this decision, and perfects a review in accordance with the Act and Rules, then this decision shall be entered as the decision of the Commission.

STATEMENT OF INTEREST RATE If the Commission reviews this award, interest at the rate set forth on the *Notice of Decision of Arbitrator* shall accrue from the date listed below to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

Signature of Arbitrator — Date: 5/23/13

MAY 29 2013

STATEMENT OF FACTS

Petitioner, Marque Smart, worked for Respondent, Central Grocers, as an Order Picker. Petitioner testified that he was as an Order Selector in the frozen foods department who goes around the warehouse and select orders for stores. Petitioner testified that his responsibilities include repetitive lifting of pallets and boxes weighing 75 pounds and cases of food weighing in excess of 5 to 100 pounds. Petitioner testified this is repetitive and continuous all day and can require lifting of 1800 to 2300 cases per day. Petitioner testified that he is a Union Steward for Respondent as well, and his responsibilities also include training new employees on how to be an Order Selector.

Petitioner testified that on January 11, 2012 he was selecting an order of 90 lbs when he felt a sharp pain in his lower back. Petitioner testified it was his first or second day back to work from being released from a previous injury he sustained. Petitioner testified he was accommodating his supervisor's request to work in the meat department, an area that Petitioner doesn't normally work in. Petitioner testified that he stopped for a minute or two finished his shift and went home. The next day the pain got worse and when he came into work, which was actually that same day as he works the evening shift, he reported it to his supervisor Ozzie, and a report was initiated. Petitioner testified that he continued to work because he felt that he could work through the pain.

Petitioner testified that he began his treatment on January 18, 2012 after he could no longer continue to work because of the pain. Petitioner was sent by Respondent to Physicians Immediate Care. The doctor noted "[Petitioner] had just returned to full-duty work on January 10, 2012 after being off of work for a year with other work-related injuries. He worked as a picker for Central Grocers and he reports that at the end of his shift on Tuesday, January 10, 2012 he was lifting several 90-pound cases of meat when he felt a pain in his left low back. He was able to finish his shift. This incident occurred about a half hour prior to the end of his shift that day. [He] returned to work the next day and reported his back pain to his supervisor. He was offered evaluation at the clinic. He declined and took what he described as a personal day… He stated that he did return to work on Thursday and Friday and worked 8 hours of full duty on each of those days. He was then off Saturday, Sunday and Monday because of the holiday and returned to work again yesterday, which was Tuesday, January 17, 2012. He said that he had persistent pain in his lower back. He says it is much worse in the morning after being in bed. He denies any radiation into his buttock or leg, except for today, he felt for the first time, tingling down his left leg to his foot. [He] denies any non-work-related incident or event correlating with the development of that condition. He rates his pain at a constant 8/10 which is worse at times, sore in quality." Petitioner was given a back support, and diagnosed with a lumbar strain. He was given the day off and told to report back to full duty the next day. (PX 7)

Petitioner followed up with Physicians Immediate Care on January 24, 2012. He again was diagnosed with a lumbar strain, released to full duty but was told to work reduced hours of 4-6 hours. (PX 7)

On February 8, 2012, Petitioner sought the care of Dr. Kern Singh at Midwest Orthopedics at Rush. Petitioner provided a consistent history. After performing an examination, Dr. Singh diagnosed a lumbar muscular strain. The doctor ordered physical therapy and returned Petitioner to full duty on a four-hour per day basis. (PX 13) From February 10, 2012 through March 5, 2012, Petitioner underwent Physical Therapy at Advanced Physical Medicine.

On February 20, 2012 Petitioner returned to Dr. Singh. The doctor noted that Petitioner had started therapy and was experiencing increased pain especially in the refrigeration unit at work. It extended in the axial

low back down the left leg into the posterior thigh and posterolateral calf. His pain was increasing. He was diagnosed with a lumbar strain and was taken off work and prescribed an MRI. On February 27, 2012 Dr. Singh took Petitioner off work until March 7, 2012. (PX 9)

On February 28, 2012, Petitioner underwent an MRI at Instant Care which showed: (PX 9)

1. L3-4 subligamentous posterior disc herniation with extruded nucleus pulposus measuring 5-6 mm indenting the ventral surface of the thecal sac with generalized spinal stenosis and bilateral neuroforaminal narrowing slightly greater on the left.

2. L4-5 6-7 mm broad-based subligamentous posterior disc herniation with extruded nucleus pulposus elevating the posterior longitudinal ligament and indenting the thecal sac with generalized spinal stenosis greater on the right with bilateral neuroforaminal narrowing also greater on the right.

3. At L5-S1 there is a 3-4 mm subligamentous posterior disc protrusion herniation also elevating the posterior longitudinal ligament and indenting the ventral surface of the thecal sac without spinal stenosis with mild bilateral neuroforaminal narrowing, slightly greater on the right.

On March 7, 2012, Dr. Kern Singh noted that he reviewed the MRI which he felt demonstrated a large central disc herniation at L4-5 causing severe spinal stenosis. He also noted there was a central disc osteophyte at L3-4 with moderate to severe stenosis. Dr. Singh diagnosed L3-L5 spinal stenosis and opined that Petitioner needed a minimally invasive L3-5 laminectomy. (PX 10)

At Respondent's request Petitioner underwent an IME with Dr. Carl Graf on March 12, 2012. Dr. Graf obtained a history, and reviewed medical documentation through Dr. Singh's February 8, 2012 visit. After performing an examination, Dr. Graf opined that Petitioner suffered from a lumbar strain. He opined that four weeks of therapy prescribed by Dr. Singh would be considered reasonable and appropriate and further opined that after that point Petitioner would be at maximum medical improvement. The doctor did not feel there was any reason Petitioner required limited hours and stated that he agreed with Physician's Immediate Care that Petitioner could have worked full duty throughout this time. He felt Petitioner could return to work at full duty in an unrestricted fashion. (RX 3)

On May 2, 2012 , Petitioner followed up with Dr. Singh. The doctor continued Petitioner's off work status and prescribing an L3-5 laminectomy/discectomy pending approval. (PX 10)

On May 10, 2012, a deposition of Dr. Singh was performed. Dr. Singh testified that the initial history Petitioner provided was consistent with the injury that he presented with. Dr. Singh stated " ...I would say this is definitely an acute event that there appears to be a causal connection in the sense that lifting heavy objects in a forward flexed position would result in a disk herniation which I do believe was reasonable in [Petitioner's] case." The doctor provided that his provisional diagnosis was L4-5 central disk herniation, L3-L5 spinal stenosis. He recommended a L3-L5 laminectomy and an L4-5 discectomy. Dr. Singh added "[Petitioner has a large disk herniation that would be unlikely to be asymptomatic. His mechanism of injury is a plausible source for a disk herniation. His symptoms are progressive and correlate with an L5 radiculopathy. He develops motor weakness over a period of six to eight weeks once again suggesting an acute change..." (PX 13)

Petitioner testified that following the deposition testimony of Dr. Kern Singh, Respondent authorized the surgical procedure and paid TTD forward from the date of the procedure until he returned to work. Petitioner testified that he did not receive TTD benefits until this time, nor did he receive TPD for reduced shift hours.

On July 6, 2012, Petitioner underwent 1.) minimally invasive L3, L4, L5 laminectomy with bilateral facetectomy and foraminotom; and 2.) Left-sided L4-5 microscopic discectomy. (PX 10)

On August 6, 2012 Petitioner was seen by Dr. Singh. Petitioner provided that he had complete resolution of his left leg pain and only had residual low back pain but felt significantly improved. He was to continue off work and start therapy three times a week for four weeks. Documents submitted also provide that Petitioner could work with a ten pound lifting, pushing and pulling restriction. As well as minimum bending and stooping. (PX 9)

On August 14, 2012, Petitioner began therapy at Accelerated on referral from Dr. Singh. (PX 8)

On September 10, 2012, Petitioner returned to Dr. Singh stating he had complete resolution of his leg pain and occasional lower back pain. He did still have some symptoms but they were mainly improved. He had been attending therapy and noted increased strength in his low back as well. The diagnosis was the same. The doctor at this time recommended he remain off work and attend a functional capacity evaluation and work conditioning. He would return to the office in six weeks. (PX 10)

On September 21, 2012, Petitioner underwent a FCE at Accelerated Rehabilitation which indicated he provided consistent performance and gave maximum effort. The FCE indicated that he could only perform 91.6% of the physical demands of his job as an order picker. It was determined that Petitioner was unable to successfully achieve occasional squat lifting, occasional overhead lifting, occasional bilateral carrying, frequent power lifting and frequent shoulder lifting. The FCE determined that he was functioning at a medium-heavy level of work which did not meet the requirements of an Order Selector. It was recommended that Petitioner participate in a daily Work Conditioning program 4hrs/day for 3-4 weeks. (PX 8)

On October 22, 2012 Petitioner returned to Dr. Singh in follow-up. Dr. Singh noted that he had a functional capacity evaluation exam on September 21, 2012 that showed valid, consistent effort and put him at the medium to heavy category of work when his job is heavy duty in nature. The doctor also noted that Petitioner's last work conditioning note placed him at 97.6% of his job demand level. Petitioner reported that overall he was doing quite well but still had some increased axial back pain with bending and squatting. The therapist suggested four more weeks of work conditioning. The doctor recommended that he complete the course of work conditioning and remain off work. He was also prescribed Mobic. (PX 10)

On November 26, 2012, Petitioner returned to Dr. Singh. The doctor noted Petitioner had completed eight weeks of work conditioning and the last note indicated he could perform 97.3% of his job demand level. Petitioner was only having trouble with the occasional squat and lift of over 50 pounds and occasional power lift over 50 pounds. He was also having trouble with the occasional bilateral carry of more than 60 pounds. Dr. Singh provided that Petitioner was at maximum medical improvement and was to return to work in the medium to heavy physical demand level as of December 3, 2012. Dr. Singh provided that if Petitioner had an increase in symptoms he could return to the office as needed. The doctor also added that Petitioner had permanent restrictions per his last work conditioning note dated November 21, 2012. (PX 10) (The November 21, 2012 work conditioning functional progress note indicates Petitioner demonstrated the ability to perform 97.3% of the physical demands of his job as an order picker. The test items Petitioner was unable to successfully achieve were occasional squat lifting, occasional power lifting and occasional bilateral carrying. It was determined that Petitioner demonstrated the ability to perform at the heavy physical demand level based on the 2-hand frequent lift of 50 lbs floor to waist. It was noted that as an order picker Petitioner was classified within the heavy physical demand level. Petitioner was discharged from work conditioning. (PX 8))

On November 28, 2012 Dr. Singh prepared a work status note indicating that per the last work conditioning note dated November 21, 2012 Petitioner was placed at the heavy demand level and could return to full-time work. (PX 10)

Petitioner testified that he returned to work in a lighter position on December 7, 2012 due to his ranking inside of the company. Petitioner is now a fork lift driver for Respondent The position does not require heavy lifting and allows him to be seated moving pallets from point A to point B.

Petitioner testified that when he returned to work in January of 2012 he was earning $24.95/hour and that was based on his union contract (Pet. Ex. #1). Petitioner testified that all Central Grocers employees that are full time are guaranteed 40 hours per week, and that on May 1st every year based on their union contract, all Central Grocers full time employees receive a pay increase based on the type of shift they work day or night, and the type of department that they work in. Petitioner testified that all employees in the same classification would receive the same rate of pay. Further, Petitioner testified that all overtime is mandatory.

Petitioner testified that he received a back TTD check dated November 14, 2012 paying him from his first day off of February 17, 2012 to June 3, 2012. Petitioner testified that he never received his TPD benefits at all during the time that he worked reduced hours and that he followed all company policies and procedures. Petitioner testified he was given no justification for why he did not receive his TPD benefits after he was placed on a reduced shift schedule by both the company doctor at Physicians Immediate Care and his treating physician, Dr. Kern Singh.

Petitioner testified that he currently does not experience a lot of pain, "just stiffness in [the] lower back from time to time." Petitioner stated that he was unable to "do any heavy lifting below my waist." He provided that lifting anything over 50 lbs "really bothers my lower back" and he was unable to participate in sports.

Petitioner offered the testimony of both Dominic Rossi and Robert Ryske who are also union stewards for Central Grocers, Union 703. Mr. Ryske has more than 27 years of experience along with Mr. Rossi who are full time employees of Central Grocers. Both of these witnesses testified that Articles 10 and 11 of the Collective Bargaining Agreement, or Union Contract cover hours worked, wages earned, and talk about mandatory overtime. Both witnesses testified that all full time employees of Central Grocers earn a wage increase on May 1st of each contract year. (Pet. Ex. #1) Both witnesses testified that the wage is based on the department classification and that all employees in the same classification would receive the same rate of pay. Both witnesses testified that they were aware that Petitioner was injured on January 11, 2012, and that it is not a requirement that any employee sign any written statements regarding an injury. Further, both testified that it is Management's responsibility to fill out the accident report. It is only the job of the injured employee to report it to their supervisor.

Respondent offered the testimony of Jorge A. Villadares who is the safety supervisor at Central Grocers. Mr. Villadares testified that he was aware that Petitioner was injured on January 11, 2012. Mr. Valladeres confirmed Petitioner's testimony that he did not seek medical attention initially and that he attempted to return to work. Mr. Valladeres testified that it is his job to fill out to prepare all of the injury report documentation for injuries that occur on the night shift. Mr. Valladeres testified that Petitioner complied with all procedures of reporting the accident.

WITH REGARD TO ISSUE (C), WHETHER AN ACCIDENT OCCURRED THAT AROSE OUT OF AND IN THE COURSE OF THE PETITIONER'S EMPLOYMENT, THE ARBITRATOR FINDS AS FOLLOWS:

Petitioner testified that he worked for Respondent as an order selector. As an order selector, Petitioner "picks" orders, which involves lifting boxes to fulfill orders. Petitioner testified while selecting an order on January 11, 2012, while working in the meat department, he lifted between 90 and 95 pounds of boxes containing meat when he felt a sharp pain in his lower back. Petitioner testified that he reported this accident the next day, January 12, 2012, to his supervisor, Ozzie. An accident report was initiated at that time. Petitioner testified that he attempted to continue to work, but could not do so due to severe pain. Petitioner was sent by Respondent for treatment with Physician's Immediate Care on January 18, 2012. Petitioner's initial visit to Physician's Immediate Care on January 18, 2012 contains a history of the accident that is consistent with his testimony at trial. Additionally, the histories provided to his medical providers as well as Respondent's IME physician are also consistent with his testimony at trial. The Arbitrator finds Petitioner's testimony credible.

Accordingly, the Arbitrator finds that Petitioner has proved that he was injured in an accident that arose out of and in the course of his employment by Respondent on January 11, 2012.

WITH REGARD TO ISSUE (G), WHAT WERE THE PETITIONER'S EARNINGS, THE ARBITRATOR FINDS AS FOLLOWS:

Petitioner testified that he had returned to his employment with Respondent following a period of absence due to a previous work related injury. The injury was adjudicated in 11 WC 07226. According to that award, Petitioner was temporarily totally disabled from December 21, 2010 through January 10, 2012, the day before this accident. Accordingly, Petitioner did not accrue any wages for the 52 week period immediately preceding this injury.

The Illinois Supreme Court has held that when it is impractical to determine average weekly wage by calculating the total amount of wages earned prior to an injury, one must look to the wages earned or those that would have been earned by a person in the same grade employed at the same work for each of such 52 weeks for the same number of hours per week by the same employer. Sylvester v. Indus. Comm'n., 197 Ill. 2d 225, 231 (2001). Accordingly, the fourth method of average weekly wage calculation is applicable to this case. (*Id.*)

Petitioner introduced a copy of the Labor Agreement with Respondent that was in place at the time of Petitioner's January 11, 2012 injury. (Pet. Ex. #1) According to Article 10 of that document governing "hours", Petitioner is guaranteed 40 hours of work per week. Further, workers for Respondent receive an increase in hourly every May 1. Petitioner testified that fellow employees employed on the same pay scale were making $24.30 per hour prior to May 1, 2011. After May 1, 2011 and according to Petitioner's pay stubs introduced as Petitioner's Exhibit #3, Petitioner's pay at the time of the accident was $24.95. Therefore, taking the hourly rate of $24.30 in conjunction with pay raise to $24.95 that a worker in Petitioner's position would earn after May 1, 2011, Petitioner's average weekly wage at the time of the accident was $990.00, or the average that a worker in Petitioner's position would have made during the 52 weeks immediately preceding this work related injury.

IN REGARD TO ISSUE (K), WHAT TEMPORARY BENEFITS ARE IN DISPUTE, THE ARBITRATOR FINDS AS FOLLOWS:

Petitioner claims entitlement for TPD benefits for the period between January 24, 2012 and February 16, 2012 for 3-2/7 weeks. Petitioner was released by Dr. Jim Kell of Physician's Immediate Care on January 24, 2012 with restrictions of only working four to six hour shifts. These restrictions were initially accommodated by Respondent. Petitioner's Exhibit 4 outlines that of the 3-2/7 weeks he is claiming TPD he was paid for working a full day on January 25, January 30 and February 6. He testified that some days he can be a floater; this is an excused absence for which he receives full compensation. He was a floater, and thus paid full salary, on February 2, 7 and 14. He was not scheduled to work on January 28 or 29, February 1, 3, 4, 5, 11 or 12. He

had an excused absence on February 8th. Thus, 6 of the days he is claiming TPD he was paid full salary and 8 of the days he was not scheduled to work, 1 day was an excused absence, for a total of 10 of the 23 days. (PX 4)

Petitioner worked partial days on January 24 (6 hours), 26 (5 hours), 27 (4 hours), 31 (5 hours), February 9 (4 hours), 10 (4.5 hours), 13(4 hours), 15 (4 hours) and 16 (.5 hours) for a total of 9 days. This results in a net of TPD rate of 35 hours. Applying an average weekly wage of $990.00, that results in an hourly wage of $24.75. Two-thirds of those hours at the regular rate is $577.50 that he would be owed in TPD. (PX 4) The Arbitrator notes that Petitioner submitted three pay stubs into evidence for the period between January 21, 2012 and February 9, 2012. (PX 3) Since he is claiming benefits between January 24, 2012 and February 16, 2012, these stubs are not helpful in calculating the proper TPD. Lastly, the Arbitrator notes Petitioner received 8 hours of floater compensation on February 18th. (PX 4) Petitioner received TTD between February 17, 2012 and December 2, 2012. (RX 5) The Respondent therefore is awarded a credit of one day, or $81.91.

With respect to TTD benefits from February 17, 2012 through December 2, 2012, Petitioner was provided work restrictions on February 8, 2012 by Dr. Kern Singh. (Pet. Ex. #10) Petitioner testified that Respondent initially accommodated these work restrictions. However, after February 17, 2012 Respondent was unable to provide further accommodation. Thereafter, Petitioner was taken off work completely by Dr. Singh during his next appointment of February 20, 2012. (*Id.*) Petitioner was kept in an off work status by Dr. Singh until being released on November 28, 2012 consistent with the last work conditioning note dated November 21, 2012 placing him at the heavy demand level. (*Id.*) Petitioner returned to work for Respondent on December 2, 2012.

Accordingly, the Arbitrator finds that Petitioner is entitled to TTD benefits from February 17, 2012 through December 2, 2012, a period of 41-2/7 weeks, less the stipulated credit for TTD benefits previously paid.

WITH REGARD TO ISSUE (L), WHAT IS THE NATURE AND EXTENT OF THE PETITIONER'S INJURIES, THE ARBITRATOR FINDS AS FOLLOWS:

The Arbitrator finds that a permanent partial disability can and shall be awarded in the absence of an impairment rating or impairment report being introduced. The plain language of Section 8.1(b) reads that, "In determining the level of permanent partial disability, the Commission shall base its determination on the following factors: (i) the reported level of impairment pursuant to subsection (a); (ii) the occupation of the injured employee; (iii) the age of the employee at the time of the injury; (iv) the employee's future earning capacity, and; (v) evidence of disability corroborated by the treating medical records. No single enumerated factor shall be the sole determinant of disability."

It is axiomatic that the plain and ordinary meaning of statutory words be used in determining how to construe the law. The plain language of the Act dictates that an impairment rating is but one of the factors to be use in determining permanent partial disability. Further, the use of the word "factor" merely shows that it is to be considered. Further, the fact that the Act dictates that no single factor shall be determinant shows that logically, the converse is also true. This means that the absence of one of the enumerated factors cannot be determinant of the permanent partial disability award.

Further, Petitioner's Exhibit #14, a memorandum from the Illinois Workers' Compensation Commission dictates that "If an impairment rating is not entered into evidence, the Arbitrator is not precluded from entering a finding of disability." The plain language of this memorandum indicates that an Arbitrator is not precluded from entering a finding of disability in the absence of an impairment rating. The language is definitive and leaves no room for misinterpretation. Accordingly, the Arbitrator finds that the absence of an impairment rating does not preclude this Arbitrator from making a finding as to disability.

Based on the factors enumerated in Section 8.1b of the Act, the Arbitrator finds the follow:

i. Neither party submitted evidence of a reported level of impairment.

ii. On the date of accident Petitioner worked for Respondent as an Order Picker. As an Order Picker Petitioner's responsibilities included repetitive lifting of pallets and boxes weighing 75 pounds and cases of food weighing in excess of 5 to 100 pounds. This is repetitive and continuous all day and can require lifting of 1800 to 2300 cases per day. Subsequent to the accident, Petitioner returned to work in a lighter position on December 7, 2012 due to his ranking inside of the company. Petitioner is now a fork lift driver for Respondent The position does not require heavy lifting and allows him to be seated moving pallets from point A to point B.

iii. Petitioner at the time of the injury was 40 years old.

iv. Petitioner's future earning capacity is likely unimpaired by his accident. His future earnings is dictated by his Union contract.

v. There is evidence of disability corroborated by the treating medical records. Petitioner was diagnosed with L4-5 central disk herniation, L3-L5 spinal stenosis. As a result he underwent 1.) minimally invasive L3, L4, L5 laminectomy with bilateral facetectomy and foraminotom; and 2.) Left-sided L4-5 microscopic discectomy. Petitioner last saw his treating physician, Dr. Singh on November 26, 2012. At that time the doctor noted Petitioner had completed eight weeks of work conditioning and the last note indicated he could perform 97.3% of his job demand level. Petitioner was having trouble with the occasional squat and lift of over 50 pounds and occasional power lift over 50 pounds. The work conditioning functional progress note indicated that the test items Petitioner was unable to successfully achieve were occasional squat lifting, occasional power lifting and occasional bilateral carrying. It was determined that Petitioner demonstrated the ability to perform at the heavy physical demand level based on the 2-hand frequent lift of 50 lbs floor to waist. It was noted that as an order picker Petitioner was classified within the heavy physical demand level. The Arbitrator observed the demeanor of Petitioner while he was testifying and finds his current complaints to be credible and consistent with the treating records.

Based on the above criterion, the Arbitrator finds that as a result of accidental injuries sustained on January 11, 2012, Petitioner is permanently disabled to the extent of 25% under Section 8(d)2 of the Act.

WITH REGARD TO ISSUE (M), SHOULD PENALTIES AND FEES BE IMPOSED UPON THE RESPONDENT, THE ARBITRATOR FINDS THE FOLLOWING:

The Arbitrator finds that Respondent's conduct in this matter was not unreasonable. A legitimate dispute existed as to whether Petitioner sustained an accident on the first day he returned to work after being off for a previous work accident. As such, Petitioner's request for penalties are hereby denied.

STATE OF ILLINOIS)
) SS.
COUNTY OF BUREAU)

☐ Affirm and adopt (no changes)	☐ Injured Workers' Benefit Fund (§4(d))
☐ Affirm with changes	☐ Rate Adjustment Fund (§8(g))
☐ Reverse Choose reason	☐ Second Injury Fund (§8(e)18)
	☐ PTD/Fatal denied
☐ Modify Choose direction	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Dennis Taylor,
Petitioner,

vs. NO: 05 WC 32131

Senica's Interstate Towing,
Respondent.

14IWCC0375

DECISION AND OPINION ON REMAND

This case is on remand from the Circuit Court of Bureau County, *Senica's Interstate Towing v. IWCC*, No. 11 MR 42, consolidated with LaSalle County 11 MR 210. The employer appealed the Commission's decision to the Circuit Court, and the Circuit Court entered an order on October 26, 2012, remanding the case to the Commission for re-calculation of the medical bills. The Circuit Court's instructions to the Commission are as follows:

> "This Court hereby confirms the decision of the Workers' Compensation Commission on all issues except concerning the employer's credit for medical expenses; the case is hereby remanded to the Commission with instructions to determine the amount of the medical bills to be paid in light of Tower Automotive v. IWCC, 407 Ill. App. 3d 427 (2011), which the Court relied upon in the remand."

The Commission notes that there is no §8(j) credit issue on remand. On the parties' Request for Hearing, Respondent stipulated that it was entitled to no §8(j) credit for payment of medical expenses. However, the following sentence was added to paragraph 7 of the Request: "Resp. paid $110,554.21 in medical." Arbitrator Andros found that the total amount of related medical expenses was $330,336.60 and awarded Petitioner $219,782.39, allowing Respondent credit for the $110,554.21 it claimed on the Request for Hearing. The Commission modified the Arbitrator's findings as to medical expenses and §8(j) credit, finding that Respondent had failed to prove that it had paid the $110,554.21 in medical expenses itself or that it was entitled to §8(j) credit for a third party's payment of those medical expenses. The Circuit Court affirmed all findings of the Commission except for the amount of medical expenses awarded and has remanded the matter with instructions for the Commission to determine that amount pursuant to the Appellate Court's ruling in *Tower Automotive.*

In *Tower Automotive v. IWCC,* 407 Ill. App. 3d 427, 943 N.E.2d 153, 943 Ill. Dec. 863 (1st Dist. WC 2011), the Appellate Court found that an employer's liability for medical expenses extends only to the amount actually paid to and accepted by medical providers, or the negotiated rate, and not to the full amount billed and not the fee schedule amount. This rule was codified in a 2005 amendment to §8(a) of the Act and applied to all claims for post- February 1, 2006 injuries. In this case, as in *Tower Automotive*, the injury occurred prior to the

14IWCC0375

effective date of the amended §8(a). In *Tower Automotive*, the employee's wife's insurer paid part of the medical expenses. The employee argued that the employer was liable for the full amount billed by the medical providers, not for the amount actually paid by his wife's insurer and himself. The Appellate Court held that the purpose of the Act would not be defeated by requiring the employer to pay only what had been paid by the third party insurer and accepted by the medical providers.

In this case, Petitioner testified that a third party insurer, MedFinance, agreed to cover the costs associated with his recommended fusion surgery after Respondent refused to authorize the treatment. Petitioner sought the full amount of medical bills or $330,336.60. Arbitrator Andros found that Respondent was entitled to a credit of $110,554.21; the Commission reversed the award of credit, finding that Respondent failed to prove that it had paid any medical expenses itself or that it was entitled to §8(j) credit for the payments. The Commission awarded Petitioner the full amount of the medical expenses.

On appeal to the Circuit Court, Respondent argued that, under these circumstances, it was not liable for the full amount of the medical expenses ($330,336.60), but was entitled under *Tower Automotive,* to reduce its liability to the amount actually paid by the third party insurer and accepted by the medical providers ($110,554.21). Immediately prior to the last date of hearing, on December 18, 2009, Respondent sought a *dedimus potestatem* to obtain the deposition of someone from Hinsdale Orthopaedics and Hinsdale Hospital to explain what medical charges remain outstanding and what the negotiated rate was that they accepted from MedFinance. Arbitrator Andros denied Respondent's request for *dedimus*, primarily based upon the timing of the request. Respondent had known about MedFinance's involvement in paying some of Petitioner's medical expenses since 2008, but did nothing to discover how much MedFinance had paid until during trial in December 2009. It is unclear whether the $110,554.21 was ever paid by MedFinance, for what expenses that amount might have been paid, and to which providers. Moreover, it is clear from the record that, at least when they were subpoenaed, all of Hinsdale Orthopaedics's and Hospital's bills remained unpaid. Subpoenaed billing records were admitted into evidence and should represent sufficient proof of Petitioner's medical expenses.

However, pursuant to the Order of the Bureau County Circuit Court, the Commission remands this case to Arbitrator Andros, or any other qualified Arbitrator sitting in his stead, for reconsideration of the calculation of medical expenses for which Respondent is liable in light of *Tower Automotive* and for the taking of any additional evidence necessary for the determination of such issues only. The Commission notes that all charges incurred after February 1, 2006 are subject to the fee schedule, pursuant to §8.2 of the Act.

IT IS THEREFORE ORDERED BY THE COMMISSION that this claim be remanded to an Illinois Workers' Compensation Commission Arbitrator for further findings as instructed by the Circuit Court of Bureau County. In no event shall Respondent be required to reimburse Petitioner for any charge which it has previously satisfied.

DATED: MAY 20 2014

Michael J. Brennan

Charles J. DeVriendt

Ruth W. White

o-02/19/14
drd/dak
68

STATE OF ILLINOIS)
) SS.
COUNTY OF MADISON)

☒ Affirm and adopt (no changes)	☐ Injured Workers' Benefit Fund (§4(d))
☐ Affirm with changes	☐ Rate Adjustment Fund (§8(g))
☐ Reverse Choose reason	☐ Second Injury Fund (§8(e)18)
	☐ PTD/Fatal denied
☐ Modify Choose direction	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Leo P. Marchiorello,
Petitioner,

vs. No. 11 WC 36510

Bechtel Construction Co.,
Respondent.

14IWCC0376

DECISION AND OPINION ON REVIEW
WITH SPECIAL FINDINGS

Timely Petitions for Review having been filed by Petitioner and Respondent, and notice given to all parties, the Commission, after considering the issues of causal connection, medical expenses, temporary total disability, nature and extent of the permanent disability, and penalties and fees, and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

The Commission further makes, in response to Petitioner's timely Request, the following Special Findings with regard to the Arbitrator's denial of penalties and fees:

1. Petitioner worked light duty for 20 weeks following his work accident on May 1, 2011. Respondent paid appropriate temporary partial disability benefits for the first 10 weeks, then suspended payment of benefits. Petitioner asks how Respondent rebuts the presumption that these benefits were unreasonably denied or delayed. At hearing, Petitioner testified that he and Respondent's insurance adjuster had "worked [things] out," so that he would receive 10 weeks of temporary partial disability. However, the terms of the agreement were unclear. Respondent suspended payment of benefits when it became clear that major surgery was recommended. Respondent was entitled to take a reasonable amount of time to investigate Petitioner's right to a total knee replacement by obtaining either a Utilization Review or §12 evaluation before continuing or permanently terminating benefits.

2. Petitioner was fired on September 16, 2011, while he was still on light duty, and Respondent refused to provide benefits. Petitioner asks whether it was unreasonable and vexatious for Respondent to deny Petitioner benefits after terminating him while he was on light duty. Petitioner was terminated because there was no longer light duty available. Respondent is entitled to obtain and rely on the causation opinion of its §12 examiner, Dr. Lehman, that Petitioner's degenerative knee condition was pre-existing and required a total knee replacement. If Petitioner's work accident were not the cause of his disability, Respondent is not obligated to provide benefits following his termination even though he was on light duty at that time.

3. Dr. Lehman admitted during his deposition that Petitioner's work-related meniscal tear was "a contributing factor" to his restrictions and need for total knee replacement. Petitioner asks if it was unreasonable and vexatious for Respondent to continue to deny benefits after this admission. The Commission notes that Dr. Lehman maintained that Petitioner's two conditions, torn meniscus and osteoarthritis, were separate and distinct and that, even absent the tear, Petitioner would have required a total knee replacement for his ongoing degenerative condition. If Petitioner already needed surgery for his degenerative condition, the fact that his work-related condition also would benefit from the surgery does not make Respondent liable for the treatment.

4. Dr. Lehman also testified during his deposition that arthroscopic surgery to repair Petitioner's meniscal tear would likely work to his detriment, due to his underlying degenerative condition. Respondent's adjuster defended Respondent's refusal to provide benefits by arguing that Petitioner had declined the meniscal surgery which it had offered to authorize and therefore terminated his rights to additional treatment and temporary total disability. Petitioner asks if Respondent's refusal to provide additional benefits after he declined the offer of meniscal repair was unreasonable and vexatious, especially in view of Dr. Lehman's admission that the repair would not benefit him and would likely be detrimental. Respondent's adjuster was wrong. Respondent was justified in denying additional benefits, based upon its reasonable reliance on Dr. Lehman's causation opinion, not because Petitioner declined to have the offered surgery. If Respondent's termination of benefits had, in fact, been based solely upon Petitioner's refusal to have what Respondent's expert admitted was potentially damaging surgery, that termination would have been vexatious and unreasonable. However, Respondent's termination of benefits was based upon Dr. Lehman's opinion that Petitioner's need for further treatment was not related to his work injury, but rather to his ongoing degenerative condition. Termination of benefits based upon the reasonable reliance upon Dr. Lehman's opinion was not vexatious or unreasonable.

14IWCC0376

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed June 13, 2013 is hereby affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay the reasonable and necessary medical expenses as identified in Petitioner's Exhibit 6, pursuant to Sections 8(a) and 8.2 of the Act, subject to the fee schedule.

IT IS FURTHER ORDERED BY THE COMMISSION that the Respondent shall have credit for all amounts paid, if any, to or on behalf of the Petitioner on account of said accidental injury. Respondent shall hold Petitioner harmless from any claims by any providers of the services for which Respondent is receiving this credit, as provided in Section 8(j) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay Petitioner temporary partial disability benefits of $426.55 per week for 20 weeks commencing May 2, 2011 through September 16, 2011, as provided in Section 8(a) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay Petitioner temporary total disability benefits of $1,243.00 per week for 34 weeks commencing September 17, 2011 through May 5, 2012, as provided in §8(b) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay Petitioner permanent partial disability benefits of $669.64 per week for 86 weeks because the injuries sustained caused the 40% loss of use of the left leg as provided in Section 8(e) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Petitioner's Petition for Penalties and Fees is denied.

IT IS FURTHER ORDERED BY THE COMMISSION that the Respondent pay to Petitioner interest under §19(n) of the Act, if any.

Bond for removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $75,000.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: MAY 20 2014

Daniel R. Donohoo

Charles J. DeVriendt

Ruth W. White

o-04/22/14
drd/dak
68

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

MARCHIORELLO, LEO
Employee/Petitioner

Case# **11WC036510**

14IWCC0376

BECHTEL CONSTRUCTION CO
Employer/Respondent

On 6/13/2013, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.08% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

A copy of this decision is mailed to the following parties:

2259 JOHNSON, MICHAEL D & ASSOC
203 N LASALLE ST
SUITE 2100
CHICAGO, IL 60601

0180 EVANS & DIXON LLC
MICHAEL A KERR
211 N BROADWAY SUITE 2500
ST LOUIS, MO 63102

STATE OF ILLINOIS)
)SS.
COUNTY OF Madison)

☐ Injured Workers' Benefit Fund (§4(d))
☐ Rate Adjustment Fund (§8(g))
☐ Second Injury Fund (§8(e)18)
☒ None of the above

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

Leo Marchiorello
Employee/Petitioner

v.

Bechtel Construction Co.
Employer/Respondent

Case # 11 WC 36510

Consolidated cases: _____

14IWCC0376

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable William R. Gallagher, Arbitrator of the Commission, in the city of Collinsville, on April 24, 2013. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. ☐ Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. ☐ Was there an employee-employer relationship?
C. ☐ Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. ☐ What was the date of the accident?
E. ☐ Was timely notice of the accident given to Respondent?
F. ☒ Is Petitioner's current condition of ill-being causally related to the injury?
G. ☐ What were Petitioner's earnings?
H. ☐ What was Petitioner's age at the time of the accident?
I. ☐ What was Petitioner's marital status at the time of the accident?
J. ☒ Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. ☒ What temporary benefits are in dispute?
☒ TPD ☐ Maintenance ☒ TTD
L. ☒ What is the nature and extent of the injury?
M. ☒ Should penalties or fees be imposed upon Respondent?
N. ☐ Is Respondent due any credit?
O. ☐ Other _____

14IWCC0376

FINDINGS

On May 1, 2011, Respondent was operating under and subject to the provisions of the Act.

On this date, an employee-employer relationship did exist between Petitioner and Respondent.

On this date, Petitioner did sustain an accident that arose out of and in the course of employment.

Timely notice of this accident was given to Respondent.

Petitioner's current condition of ill-being is causally related to the accident.

In the year preceding the injury, Petitioner earned $100,000.00; the average weekly wage was $2,268.86.

On the date of accident, Petitioner was 56 years of age, married with 0 dependent child(ren).

Petitioner has received all reasonable and necessary medical services.

Respondent has not paid all appropriate charges for all reasonable and necessary medical services.

Respondent shall be given a credit of $4,925.20 for TTD, $4,265.51 for TPD, $0.00 for maintenance, and $0.00 for other benefits, for a total credit of $9,190 .71.

Respondent is entitled to a credit of amounts paid under Section 8(j) of the Act.

ORDER

Respondent shall pay reasonable and necessary medical expenses as identified in Petitioner's Exhibit 6 as provided in Sections 8(a) and 8.2 of the Act, subject to the fee schedule. Respondent shall be given a credit of amounts paid for medical benefits that have been paid, and Respondent shall hold Petitioner harmless from any claims by any providers of the services for which Respondent is receiving this credit, as provided in Section 8(j) of the Act.

Respondent shall pay Petitioner temporary partial disability benefits of $426.55 per week for 20 weeks commencing May 2, 2011, through September 16, 2011, as provided in Section 8(a) of the Act.

Respondent shall pay Petitioner temporary total disability benefits of $1,243.00 per week for 34 weeks commencing September 17, 2011, through May 5, 2012, as provided in Section 8(b) of the Act.

Respondent shall pay Petitioner permanent partial disability benefits of $669.64 per week for 86 weeks because the injuries sustained caused the 40% loss of use of the left leg as provided in Section 8(e) of the Act.

Based upon the Arbitrator's conclusions of law attached hereto, Petitioner's claim for penalties and attorneys' fees is denied.

RULES REGARDING APPEALS Unless a party files a *Petition for Review* within 30 days after receipt of this decision, and perfects a review in accordance with the Act and Rules, then this decision shall be entered as the decision of the Commission.

STATEMENT OF INTEREST RATE If the Commission reviews this award, interest at the rate set forth on the *Notice of Decision of Arbitrator* shall accrue from the date listed below to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

William R. Gallagher, Arbitrator

June 7, 2013
Date

ICArbDec p. 2

JUN 13 2013

Petitioner filed an Application for Adjustment of Claim which alleged he sustained an accidental injury arising out of and in the course of his employment for Respondent on May 1, 2011. According to the Application, Petitioner sustained an injury to his left knee when he twisted it on the job site. There was no dispute that Petitioner sustained a work-related injury on May 1, 2011; however, Respondent disputed liability on the basis of causal relationship. Because of this dispute, Respondent denied liability for a significant period of both temporary total and temporary partial disability benefits and medical bills of approximately $109,000.00. Petitioner filed a petition for Section 19(k) and Section 19(l) penalties and Section 16 attorneys' fees.

At the time of this accident, Petitioner worked for Respondent as an electrician on a major project in Lively Grove, Illinois. Petitioner's primary job duties were installation of conduit and cable which Petitioner described as being very physically demanding because the conduit is extremely heavy and it is necessary to get in awkward positions when moving and installing it, etc. Further, Petitioner was working 10 hours a day, six days a week, for a total of 60 hours a week. On May 1, 2011, Petitioner was walking in front of some storage tanks when he stepped into a rut and felt something snap in his left knee. Petitioner testified that this was extremely painful and that he was unable to bear weight.

Prior to May 1, 2011, Petitioner had problems with both his left and right knees. In 2000, Petitioner was treated by Dr. E. J. Bartucci, who performed arthroscopic medial meniscus surgeries on both knees on May 18, 2000. Following the surgeries, Petitioner had some symptoms with his knees but more so in regard to the left knee. Dr. Bartucci's medical record of April 17, 2002, noted that Petitioner had more symptoms to the left knee and that its medial compartment was damaged which caused pain, catching and crepitus. An MRI was performed on April 18, 2002, which revealed some degenerative osteoarthritic changes. Dr. Bartucci gave Petitioner Hyalgan injections to the left knee on April 29, May 6, and May 13, 2002.

Petitioner testified that these injections helped his left knee and that other than taking some anti-inflammatory medications that he did not have any further medical treatment to his left knee until he was seen by Dr. Anthony Lin, his primary care physician, on April 21, 2011. Dr. Lin's record of that date noted that Petitioner had long-standing left knee pain with mild swelling. Dr. Lin administered a cortisone injection to Petitioner's left knee on that date. At trial, Petitioner testified that he had been experiencing left knee pain for approximately one month preceding the accident but he had not lost any time from work because of it. Petitioner stated that the cortisone injection did not give him much relief.

Subsequent to the accident of May 1, 2011, Petitioner went to the ER of Sparta Community Hospital. Petitioner informed the ER personnel of sustaining an injury to his left knee when he stepped into a hole as well as the prior arthroscopic surgeries. X-rays of the left knee revealed degenerative arthrosis and the radiologist recommended an orthopedic consultation to consider joint replacement. Petitioner returned to Sparta Community Hospital on May 9, 2011, and reported some improvement in the prior symptoms and that he had been working light duty. Petitioner again return to Sparta Community Hospital on May 13, 2011, and it was still noted that he had left knee symptoms so an MRI was recommended. An MRI scan was performed on

May 17, 2011, which revealed an acute tear of the medial meniscus within an area of advanced degenerative arthrosis.

On June 10, 2011, Petitioner was seen by Dr. Tony Chien, an orthopedic surgeon, who confirmed the diagnosis of a torn medial meniscus of the left knee and recommended arthroscopic surgery. He opined that Petitioner could work but with restrictions of no lifting more than 15 pounds and that he be confined to a desk or sitting type job.

On July 1, 2011, Petitioner was seen by Dr. Evan Ellis, an orthopedic surgeon. Petitioner provided Dr. Ellis with a history of the accident of May 1, 2011, and stated that he had been experiencing pain and swelling since that time. Dr. Ellis noted that Petitioner previously had arthritis but had been managing and coping with it up until the accident. Dr. Ellis had x-rays taken which revealed bone-on-bone arthritic changes in medial compartment of the left knee. He also reviewed the MRI and opined that there was a meniscal tear; however, he suspected that this was not a new tear but, more likely, a chronic tear. Dr. Ellis' impression was left knee pain with end-stage osteoarthritis and arthritic flare. Dr. Ellis opined this was an aggravation of an injury that was previously under good control and recommended Petitioner have a knee brace to delay undergoing a total knee replacement; however, given the arthritic changes that were present, Dr. Ellis noted that Petitioner ultimately would probably require a total knee replacement.

At the direction of Respondent, Petitioner was examined by Dr. Richard Lehman, an orthopedic surgeon, on August 2, 2011. Dr. Lehman obtained a history from Petitioner, reviewed medical records and the MRI scan and examined the Petitioner. Dr. Lehman opined that Petitioner had a degenerative arthritic knee with an acute medial meniscus tear. In regard to treatment, Dr. Lehman stated that Petitioner could have a knee arthroscopic procedure to address the torn meniscus; however, if he were to undergo this surgery it would have only dealt with the meniscal pathology. Because of the pre-existing arthritis, Dr. Lehman opined that Petitioner should have a total knee replacement but that this component of his knee symptomatology was not related to the accident. In his report, Dr. Lehman stated "There has been no exacerbation or pathology in this injury that has in any way altered his arthritis." Dr. Lehman agreed that work/activity restrictions were required, specifically, no climbing, no squatting, no kneeling and no standing more than two to three hours per day; however, he stated that these restrictions were temporary and directly related to the arthritis.

From May 3, 2011 through September 16, 2011, Petitioner continued to work for Respondent performing light duty. Petitioner testified that while performing light duty his hours were reduced from 60 hours a week to 40 hours a week and that he was paid 10 weeks temporary partial disability benefits. On September 16, 2011, Petitioner's employment with Respondent was terminated because there was no light duty work available for him to perform. Petitioner was paid temporary total disability benefits for four and one-sevenths (4 1/7) weeks, from September 16, 2011, through October 14, 2011. At that time (based on an e-mail sent to Petitioner's counsel on September 23, 2011) temporary total disability benefits were terminated.

On October 15, 2011, Petitioner returned to Dr. Lin, but Dr. Lin did not examine Petitioner at that time but had a discussion with him regarding his knee pain and the completion of a disability claim for Petitioner's life insurance. On October 17, 2011, Dr. Lin completed and signed a

document entitled "Attending Physician's Statement" for Fidelity & Guaranty Life Insurance Company in which he stated Petitioner's symptoms appeared in 1993 and that he first treated Petitioner for left knee problems on April 21, 2011. On October 18, 2011, Dr. Lin signed a document provided by the Illinois Workers' Compensation Commission entitled "Rehabilitation Plan" which stated that Petitioner sustained an accidental injury on May 1, 2011, that caused an acute meniscal tear and aggravated Petitioner's degenerative arthritis leading to an onset of enhanced symptoms and that a total knee replacement was indicated.

Dr. Lin referred Petitioner to Dr. Joshua Jacobs, an orthopedic surgeon, who saw Petitioner on November 1, 2011. Dr. Jacobs noted that Petitioner had a long history of left knee pain and was disabled from working as an electrician. There was no reference to the work-related accident of May 1, 2011, in Dr. Jacobs' record of that date. Dr. Jacobs obtained x-rays and reviewed the MRI scan and opined that Petitioner had severe osteoarthritis of the left knee. Dr. Jacobs recommended that Petitioner have a total knee replacement, but, due to his unavailability to perform surgery, he referred Petitioner to Dr. Scott Sporer, an orthopedic surgeon, who saw Petitioner on November 2, 2011. Dr. Sporer's record also lacked a history of the work-related accident of May 1, 2011, and he likewise diagnosed Petitioner with left knee degenerative arthritis and recommended a total knee replacement surgery.

Dr. Sporer performed total knee replacement surgery on Petitioner's left knee on November 17, 2011. Petitioner remained under his care following the surgery, received physical therapy and was released to return to work May 6, 2012.

Dr. Lehman was deposed on February 13, 2012, and his deposition testimony was received into evidence at trial. Dr. Lehman's deposition testimony was consistent with his narrative medical report. Dr. Lehman agreed that the meniscal tear was related to the accident of May 1, 2011, and that Petitioner suffered from two distinct conditions, the pre-existing degenerative arthritis and the torn meniscus. Dr. Lehman strongly recommended against performing the meniscectomy because that procedure would increase the likelihood of internal collapse of the knee compartment. Dr. Lehman testified that both the arthritis and the meniscal tear were components and that the only appropriate surgical procedure that would permit Petitioner to return to work was a total knee replacement.

Dr. Lin was deposed on April 12, 2012, and his deposition testimony was received into evidence at trial. Dr. Lin is a family practitioner and he opined that the accident of May 1, 2011, could aggravate the arthritic condition and Petitioner's left knee. He also testified that he agreed with the work restrictions imposed by Dr. Lehman; however, he opined that they were related to the accident of May 1, 2011. In regard to the Rehabilitation Plan form, Dr. Lin testified that he did not complete the form; however, he testified that he agreed with the statements contained therein. He did not have any specific knowledge as to who drafted the statement.

At trial, Petitioner testified that he still experiences some discomfort in his knee, that it lacks full mobility and that while he was able to return to work as an electrician, he is generally more cautious now than he was previously especially when doing any climbing on ladders or working with heights.

Conclusions of Law

In regard to disputed issue (F) the Arbitrator makes the following conclusion of law:

The Arbitrator concludes that Petitioner's condition of ill-being is causally related to the accident of May 1, 2011.

In support of this conclusion the Arbitrator notes the following:

There is no dispute that Petitioner had pre-existing degenerative arthritis in the left knee; however, with the exception of the one cortisone shot of April 21, 2011, Petitioner had not had any active medical treatment for his left knee since May, 2002.

Respondent's Section 12 examiner, Dr. Lehman, opined that the tear of the medial meniscus was related to the accident of May 1, 2011, but that the degenerative arthritic condition was neither related to nor aggravated by the accident. While Dr. Lehman opined that the two conditions were separate and distinct from one another, he also opined that meniscus surgery would not resolve Petitioner's knee problems and could actually worsen his knee condition. He described both of these conditions as being components which contributed to the overall condition in Petitioner's left knee.

No one ever recommended that Petitioner have a total knee replacement surgery performed any time prior to the accident of May 1, 2011, and meniscal surgery was not performed following the accident. Consistent with Dr. Lehman's opinion, the Petitioner ultimately had a total knee replacement surgical procedure performed on him by Dr. Sporer.

Dr. Lin opined that there was a causal relationship between the accident of May 1, 2011, and that the accident aggravated the pre-existing degenerative arthritis.

In regard to disputed issue (J) the Arbitrator makes the following conclusion of law:

The Arbitrator concludes that all of the medical treatment provided to Petitioner was reasonable and necessary and that Respondent is liable for payment of the medical bills associated therewith.

Respondent shall pay reasonable and necessary medical services as identified in Petitioner's Exhibit 6, as provided in Sections 8(a) and 8.2 of the Act. Respondent shall be given a credit of amounts paid for medical benefits that have been paid, and Respondent shall hold Petitioner harmless from any claims by any providers of the services for which Respondent is receiving this credit, as provided in Section 8(j) of the Act.

In regard to disputed issue (K) the Arbitrator makes the following conclusions of law:

The Arbitrator concludes that Petitioner is entitled to temporary partial disability benefits of 20 weeks commencing May 2, 2011 through September 16, 2011.

The Arbitrator concludes that Petitioner is entitled to temporary total disability benefits of 34 weeks commencing September 17, 2011, through May 5, 2012.

In regard to disputed issue (L) the Arbitrator makes the following conclusion of law:

The Arbitrator concludes Petitioner has sustained permanent partial disability to the extent of 40% loss of use of the left leg.

In regard to disputed issue (M) the Arbitrator makes the following conclusion of law:

The Arbitrator concludes that Petitioner is not entitled to Section 19(k) or Section 19(l) penalties or Section 16 attorneys' fees.

In support of this conclusion the Arbitrator notes the following:

Given the opinion of Dr. Lehman as to causality, the Arbitrator concludes Respondent's position denying liability in this case was neither vexatious nor unreasonable.

William R. Gallagher, Arbitrator

STATE OF ILLINOIS)
) SS.
COUNTY OF)
SANGAMON

☒ Affirm and adopt (no changes)	☐ Injured Workers' Benefit Fund (§4(d))
☐ Affirm with changes	☐ Rate Adjustment Fund (§8(g))
☐ Reverse Choose reason	☐ Second Injury Fund (§8(e)18)
	☐ PTD/Fatal denied
☐ Modify Choose direction	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Lori A. Wedel,

Petitioner,

vs. NO: 12 WC 10671

Illinois Department of Transportation,

14IWCC0377

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Petitioner herein and notice given to all parties, the Commission, after considering the issues of accident, causal connection, temporary total disability, permanent partial disability, and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed September 4, 2013, is hereby affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that the Respondent pay to Petitioner interest under §19(n) of the Act, if any.

IT IS FURTHER ORDERED BY THE COMMISSION that the Respondent shall have credit for all amounts paid, if any, to or on behalf of the Petitioner on account of said accidental injury.

DATED: MAY 21 2014
TJT:yl
o 5/6/14
51

Thomas J. Tyrrell

Kevin W. Lamborn

Michael J. Brennan

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

WEDEL, LORI
Employee/Petitioner

Case# **12WC010671**

STATE OF ILLINOIS
Employer/Respondent

14IWCC0377

On 9/4/2013, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.05% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

A copy of this decision is mailed to the following parties:

0332 LIVINGSTONE MUELLER O'BRIEN ET AL
MARTIN J HAXEL
PO BOX 335
SPRINGFIELD, IL 62705

0502 ST EMPLOYMENT RETIREMENT SYSTEMS
2101 S VETERANS PKWY*
PO BOX 19255
SPRINGFIELD, IL 62794-9255

4390 ASSISTANT ATTORNEY GENERAL
ERIN DOUGHTY
500 S SECOND ST
SPRINGFIELD, IL 62706

0498 STATE OF ILLINOIS
ATTORNEY GENERAL
100 W RANDOLPH ST
13TH FLOOR
CHICAGO, IL 60601-3227

1430 CMS BUREAU OF RISK MGMT
WORKERS COMPENSATION MANAGER
PO BOX 19208
SPRINGFIELD, IL 62794-9208

CERTIFIED as a true and correct copy pursuant to 820 ILCS 305/14

SEP 4 2013

KIMBERLY B. JANAS Secretary
Illinois Workers' Compensation Commission

14IWCC0377

STATE OF ILLINOIS)
)SS.
COUNTY OF Sangamon)

☐ Injured Workers' Benefit Fund (§4(d))
☐ Rate Adjustment Fund (§8(g))
☐ Second Injury Fund (§8(e)18)
☒ None of the above

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

Lori Wedel
Employee/Petitioner

v.

State of Illinois
Employer/Respondent

Case # 12 WC 10671

Consolidated cases: _____

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Douglas McCarthy**, Arbitrator of the Commission, in the city of **Springfield**, on **August 13, 2013**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. ☐ Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. ☐ Was there an employee-employer relationship?
C. ☒ Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. ☐ What was the date of the accident?
E. ☐ Was timely notice of the accident given to Respondent?
F. ☒ Is Petitioner's current condition of ill-being causally related to the injury?
G. ☐ What were Petitioner's earnings?
H. ☐ What was Petitioner's age at the time of the accident?
I. ☐ What was Petitioner's marital status at the time of the accident?
J. ☐ Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. ☒ What temporary benefits are in dispute?
☐ TPD ☐ Maintenance ☒ TTD
L. ☒ What is the nature and extent of the injury?
M. ☐ Should penalties or fees be imposed upon Respondent?
N. ☐ Is Respondent due any credit?
O. ☐ Other _____

14IWCC0377

FINDINGS

On **October 20, 2011**, Respondent ***was*** operating under and subject to the provisions of the Act.

On this date, an employee-employer relationship ***did*** exist between Petitioner and Respondent.

On this date, Petitioner ***did*** sustain an accident that arose out of and in the course of employment.

Timely notice of this accident ***was*** given to Respondent.

Petitioner's current condition of ill-being ***is*** causally related to the accident.

In the year preceding the injury, Petitioner earned $**49,317.84**; the average weekly wage was $**948.42**.

On the date of accident, Petitioner was **55** years of age, ***married*** with **0** dependent children.

Petitioner ***has*** received all reasonable and necessary medical services.

Respondent ***has*** paid all appropriate charges for all reasonable and necessary medical services.

Respondent shall be given a credit of $ for TTD, $ for TPD, $ for maintenance, and $ for other benefits, for a total credit of $.

Respondent is entitled to a credit for all medical expenses it paid pursuant to RX2 under Section 8(j) of the Act.

ORDER

Mr. Haxel, on oral and written motion, is by stipulation substituted in as the Petitioner's attorney.

Respondent shall pay Petitioner temporary total disability benefits of $632.28 for 2 1/7 weeks commencing 5/09/2012 through 5/23/2012 as provided in Section 8(b) of the Act.

Petitioner has not proven that she sustained any permanent disability as a result of her accident, and no permanency is awarded.

RULES REGARDING APPEALS Unless a party files a *Petition for Review* within 30 days after receipt of this decision, and perfects a review in accordance with the Act and Rules, then this decision shall be entered as the decision of the Commission.

STATEMENT OF INTEREST RATE If the Commission reviews this award, interest at the rate set forth on the *Notice of Decision of Arbitrator* shall accrue from the date listed below to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

D. Ltr McCarthy
Signature of Arbitrator

Aug. 29, 2013
Date

SEP 4 - 2013

Mr. Haxel is substituted in as the attorney for the Petitioner. See the stipulation attached and made part of the order.

In support of (C), did an accident occur that arose out of and in the course of Petitioner's employment by Respondent, and (F), is Petitioner's current condition of ill-being causally related to the injury, the Arbitrator finds the following facts:

Jennifer Sunderland testified on behalf of the Petitioner. She has been Petitioner's immediate supervisor since February of 2011. She is familiar with all of Petitioner's job duties, observes Petitioner working on several occasions each day and actually has performed Petitioner's job duties when Petitioner is away on vacation or during other absences from work.

Sunderland further testified that she does not like doing Petitioner's job. She has to stop and rest because her hands and wrists hurt. Petitioner is responsible for all of the data input for payroll for approximately 400 district employees. During the winter months, the number of employees increase by approximately 200. Payroll needs to be completed every two weeks. Petitioner receives time sheets, overtime sheets and leave slips from the employees. Time sheets are received from at least half of all employees. Leave slips number approximately 2,000 each month. Each of these sheets or forms or slips is a piece of paper that Petitioner reads, calculates the accuracy of the data and then enters the data into the computer system.

When entering the data into the computer, each employee has an employee number. The particular type of data being entered must also be identified by a code number. The date must also be entered. Then the data from the paper forms are entered into the computer which then generates a written report which is reviewed for accuracy and returned to the Petitioner.

Sunderland further testified that she recalls Petitioner rubbing her left little finger and ring fingers together because they were numb. She also recalls Petitioner putting her left elbow on top of her desk and immediately pulling it off because of the pain she experienced. Sunderland testified that these actions occurred before Petitioner had her surgery. Petitioner is left handed.

Petitioner testified and corroborated the testimony of her immediate supervisor. Petitioner also stated that there were additional forms she handled for each and every payroll period including vehicle usage slips, automatic payroll deduction forms, sick bank forms, direct deposit forms, etc. Consistent with Sunderland's testimony, each of these is a piece of paper that Petitioner examines by hand and determines the accuracy of the information on the paper before entering all of the data into the computer. Petitioner gets two 15-minute breaks during the day with an additional 30 minutes for lunch. All other time during the work day is spent working and there really is no down time. This testimony was corroborated by the testimony of supervisor Sunderland.

Petitioner further testified that her job duties used to be performed by two employees but when the other employee retired eight to 10 years ago, she was not replaced and Petitioner has been completing all of the job tasks ever since. Petitioner further testified that she is left handed and does everything with her left hand and arm.

Petitioner further testified that when she examined each piece of paper, her left arm is resting on top of the desk. When she is keyboarding, her elbows are at an approximate 90 degree angle, sometimes at a greater angle and sometimes at a lesser angle. When her arms tire while keyboarding, she will rest them on armrests.

Petitioner testified that when she would leave on vacation, her symptoms significantly improved but would return after she resumed working again. Her date of accident is October 20, 2011 because that is the date Dr. Gelber performed an EMG test which confirmed a diagnosis of left cubital tunnel syndrome (PX2). Petitioner underwent cubital tunnel surgery by Dr. Greatting on May 9, 2012 (PX3).

Petitioner must also answer the phone and demonstrated her elbow position when talking on the phone as hyperflexed. Petitioner must also write by hand many messages throughout the day.

Jennifer Sunderland's supervisor is Nicole Aleman-Hughes who prepared a form entitled "DEMANDS OF THE JOB" after Petitioner reported this as a work injury. According to this form, Petitioner's job duties required the use of her hands for gross manipulation tasks and fine manipulation tasks six to eight hours per day (RX1).

Petitioner first saw Dr. Greatting on April 12, 2012. Petitioner's history of her cubital tunnel syndrome and her work activities as contained in the doctor's office visit note of that date is consistent with the evidence presented at arbitration. Dr. Greatting opined that Petitioner's work activities caused, contributed to the develop of or aggravated her cubital tunnel syndrome (PX3).

Petitioner was examined by Dr. James R. Williams at the request of the Respondent. In conjunction with this examination, Dr. Williams reviewed medical records from various doctors who have treated the Petitioner. One of these doctors is Dr. Stephen Kozak of Springfield Clinic. He is the doctor who referred Petitioner to Dr. Greatting (PX3). Dr. Williams notes in his IME report that Dr. Kozak opined that Petitioner's cubital tunnel syndrome was likely caused by her desk work at the Illinois Department of Transportation. The records of Dr. Gelber were also reviewed and he opined that Petitioner's work activities caused or contributed to Petitioner's cubital tunnel syndrome (RX3).

Dr. Williams was of the opinion that Petitioner's job activities were not repetitive and that typing alone was not a cause for cubital tunnel. However, Dr. Williams also stated that resting her left arm and forearm on her desk while performing work activities could possibly aggravate her condition depending upon all of the surrounding circumstances such as the frequency with which this occurs (RX3).

Upon consideration of all of the evidence, it is quite clear that Petitioner's job duties either caused or aggravated her cubital tunnel syndrome thereby entitling her to benefits. The detailed testimony of both Petitioner and her immediate supervisor described activities which completely fill the entire work day and always involve the use of Petitioner's left hand and left arm. Petitioner literally handles thousands of pieces of paper each month as well as hours of keyboarding each day. The evidence describing Petitioner's job duties is both repetitive and consistent with the histories provided to all of the doctors who either treated her or examined her. This conclusion is supported by the "DEMANDS OF THE JOB" form prepared by Nicole Aleman-Hughes which indicates the use of her hands (and, obviously, also her arms) for six to eight hours each day.

Lastly, three different treating physicians (Kozak, Gelber and Greatting) all opined that Petitioner's work activities were a causative factor in the development of her cubital tunnel syndrome. The only dissenting opinion came from Respondent's examining physician, Dr. Williams, and even he acknowledged the possibility that the positioning of Petitioner's left arm could aggravate her cubital tunnel syndrome.

Ample proof has been submitted by the Petitioner who has proven the existence of an accident arising out of and in the course of her employment and also that her current condition of ill-being is causally related to the accident.

In support of (K), what temporary benefits are in dispute, the Arbitrator finds the following facts:

Petitioner testified that her treating surgeon, Dr. Greatting, kept her off work following her surgery on May 9, 2012. Petitioner also testified that she did not work on the date of the surgery. Dr. Greatting released Petitioner to return to work without any restrictions beginning on May 24, 2012 (PX3).

The evidence indicates that Petitioner is entitled to receive temporary total disability benefits for the above-mentioned period of time which constitutes 2 1/7 weeks.

Issue (L): What is The Nature and Extent of the Injury?

The Arbitrator notes that Petitioner's date of injury is October 20, 2011, thereby subjecting her to the §8.1b guidelines of the Illinois Workers' Compensation Act. According to §8.1b(b) "the Commission shall base its determination on the following factors: (i) the reported level of impairment pursuant to subsection (a); (ii) the occupation of the injured employee; (iii) the age of the employee at the time of injury; (iv) employee's future earning capacity; (v) evidence of disability corroborated by treating medical records."

Both parties waved the submission of an AMA report. (T, pg. 63). With regard to subsection (ii) Petitioner is still a human resources associate for IDOT. (T, pg. 62). She has held that position for approximately 13 years. (T, pg. 38). Her current job is clerical in nature, and involves intermittent typing, data entry, answering telephones, filing, and checking paperwork for correctness. (T, pg. 11-46, 51-55). Her job duties are varied. (T, pg. 54). Petitioner was 55 years old at the time of her alleged accident. Petitioner continued to work regular duty after filing her claim, and returned to work full duty following her elective surgery. She did not testify as to her post surgery symptoms. Her ability to perform her job duties has not been impacted by her injury, and as such her future earning capacity is not diminished. With regard to subsection (v) in the final records from her IME, approximately 3 months after her surgery, Petitioner reported that her pain was a 0/10, and that she no longer experienced any numbness or tingling. (RX 3). In his final office note of July 13, 2012, Dr. Greatting noted that the Petitioner, six weeks after returning to work, reported that her numbness had resolved and that her strength was good. He said she had a good range of motion, and released her from care. (PX 3) Based upon the culmination of these factors, the Arbitrator finds that Petitioner has suffered no permanent partial disability and therefore is entitled to no award of permanency related to the October 20, 2011 injury.

STATE OF ILLINOIS)
) SS.
COUNTY OF)
SANGAMON

☒ Affirm and adopt (no changes)	☐ Injured Workers' Benefit Fund (§4(d))
☐ Affirm with changes	☐ Rate Adjustment Fund (§8(g))
☐ Reverse Choose reason	☐ Second Injury Fund (§8(e)18)
	☐ PTD/Fatal denied
☐ Modify Choose direction	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Kevin Holder,

Petitioner,

vs.

NO: 12 WC 21097

14IWCC0378

Funk Pest Control & Tree Service,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review under §19(b) having been filed by the Petitioner herein and notice given to all parties, the Commission, after considering the issues of accident, notice, causal connection, medical expenses, prospective medical expenses, temporary total disability, and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed November 18, 2013, is hereby affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that the Respondent pay to Petitioner interest under §19(n) of the Act, if any.

The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: MAY 21 2014
TJT:yl
o 5/6/14
51

Thomas J. Tyrrell

Kevin W. Lamborn

Michael J. Brennan

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF 19(b) DECISION OF ARBITRATOR

HOLDER, KEVIN
Employee/Petitioner

Case# **12WC021097**

FUNK PEST CONTROL & TREE SERVICE
Employer/Respondent

14IWCC0378

On 11/18/2013, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.09% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

A copy of this decision is mailed to the following parties:

4551 LAW OFFICE KEITH SHORT PC
1801 N MAIN ST
EDWARDSVILLE, IL 62025

2795 HENNESSY & ROACH PC
JENNIFER YATES WELLER
415 N 10TH ST SUITE 200
ST LOUIS, MO 63101

STATE OF ILLINOIS)
)SS.
COUNTY OF Adams)

☐ Injured Workers' Benefit Fund (§4(d))
☐ Rate Adjustment Fund (§8(g))
☐ Second Injury Fund (§8(e)18)
☒ None of the above

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

KEVIN HOLDER
Employee/Petitioner

v.

FUNK PEST CONTROL & TREE SERVICE
Employer/Respondent

Case # 12 WC 21097

Consolidated cases: N/A

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Nancy Lindsay**, Arbitrator of the Commission, in the city of **Springfield**, on **September 20, 2013**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. ☐ Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. ☐ Was there an employee-employer relationship?
C. ☒ Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. ☐ What was the date of the accident?
E. ☒ Was timely notice of the accident given to Respondent?
F. ☒ Is Petitioner's current condition of ill-being causally related to the injury?
G. ☐ What were Petitioner's earnings?
H. ☐ What was Petitioner's age at the time of the accident?
I. ☐ What was Petitioner's marital status at the time of the accident?
J. ☒ Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. ☒ Is Petitioner entitled to any prospective medical care?
L. ☒ What temporary benefits are in dispute?
☐ TPD ☐ Maintenance ☒ TTD
M. ☐ Should penalties or fees be imposed upon Respondent?
N. ☐ Is Respondent due any credit?
O. ☐ Other _____

FINDINGS

On the date of accident, **03/09/12**, Respondent ***was*** operating under and subject to the provisions of the Act.

On this date, an employee-employer relationship ***did*** exist between Petitioner and Respondent.

On this date, Petitioner ***did not*** sustain an accident that arose out of and in the course of employment.

Petitioner's current condition of ill-being ***is not*** causally related to the accident.

In the year preceding the injury, Petitioner earned **$25,616.24**; the average weekly wage was **$492.62**.

On the date of accident, Petitioner was **41** years of age, ***single*** with **0** dependent children.

Respondent ***has not*** paid all reasonable and necessary charges for all reasonable and necessary medical services.

Respondent shall be given a credit of **$0** for TTD, **$0** for TPD, **$0** for maintenance, and **$0** for other benefits, for a total credit of **$0**.

Respondent is entitled to a credit of **$0** under Section 8(j) of the Act.

ORDER

Petitioner failed to prove he sustained an accident on March 9, 2012 or that his current condition of ill-being in his lower back and neck is causally connected to his March 9, 2012 accident. Petitioner's claim is denied. No benefits are awarded.

RULES REGARDING APPEALS Unless a party files a *Petition for Review* within 30 days after receipt of this decision, and perfects a review in accordance with the Act and Rules, then this decision shall be entered as the decision of the Commission.

STATEMENT OF INTEREST RATE If the Commission reviews this award, interest at the rate set forth on the *Notice of Decision of Arbitrator* shall accrue from the date listed below to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

Jenny Lindsay
Signature of Arbitrator

November 14, 2013
Date

ICArbDec19(b)

NOV 18 2013

Petitioner alleges he injured his neck and lower back on March 9, 2012 when he was struck by a tree limb. The issues in disputes are accident, notice, causal connection, prospective medical care, temporary total disability, and medical expenses. At the time of arbitration the following witnesses testified: Petitioner; Derek Boxdorfer; and Garrett (a/k/a Gary) Funk.

The Arbitrator finds as follows:

Pre-Arbitration

Petitioner presented to the emergency room at Passavant Hospital on May 29, 2012. According to the Passavant Hospital "Facesheet" (PX 2, p. 13/34) Petitioner provided an accident date of May 29, 2012 and listed the time as 10:05 a.m. The reason for admission was "back pain." (PX 2, p.13/34) Petitioner had no primary care physician. His chief complaint was back pain and the Nursing Record indicates that a few months back Petitioner had a tree limb fall onto his shoulders and he was stuck in a bucket for less than fifteen minutes with problems off and on since then, including burning between his shoulder blades that radiated to his low back. Petitioner had not been taking any pain medication but reported being unable to sleep due to the pain. According to Petitioner it was "just getting worse" and he was unable to work without experiencing pain. (PX 2, p. 21/34) When examined by Dr. Savage he noted a sixty day history of back pain with a current problem of difficulty sleeping. He further noted Petitioner's history of a branch falling on his shoulders while he was trimming a tree at work. Petitioner's pain drawing revealed a dull back pain between the shoulder blades and at the belt-line, mid-back. (PX 2, p. 25/34) Petitioner also complained of headaches. Thoracic spine x-rays revealed degenerative disc disease. Dr. Savage's impression was acute thoracic and lumbosacral back strains. Petitioner was given a prescription for Flexeril and Naproxen and told to follow up with Dr. Griffin. Petitioner was also given a medical certificate certifying he was unable to work for one day. (PX 2, p. 32/24)

Petitioner was next examined by nurse practitioner, Abby Fry, on May 31, 2012, in follow-up from the emergency room. Petitioner's chief complaint was upper back pain. Ms. Fry noted Petitioner's onset date of the "first part of March" and he reported trimming a tree when it landed on his shoulder blades. Petitioner had gone to the emergency room and been given Flexeril and Naproxen with some relief. Petitioner reported the inability to sleep, a burning sensation in his neck and shoulders, increased pain with range of motion, and chronic numbness in his hands since a heart attack. Petitioner also stated that he experienced lower back pain if he stood for too long. On physical examination Petitioner had full range of motion but experienced pain with full elevation on the right. Petitioner was also noted to have increased pain on the left when reaching behind. He was tender to palpation along the bilateral trapezius. Petitioner was given a script for a cervical x-ray and physical therapy and given a prescription for Tramadol, to be taken as needed for pain. He was taken off work through June 11, 2012 and was to follow-up in one week. (PX 5)

Petitioner presented to the emergency room at Passavant Hospital later that same day. According to the Passavant Hospital "Facesheet" (PX 2, p. 7/34) Petitioner provided an accident date of March 5, 2012 and listed the time as 7:00 a.m. The reason for admission was "xr sc." (PX 2, p. 7/34) A script for a cervical spine x-ray is found in PX 2. It originated with Jacksonville Family Medical Associates. (PX 2, p. 11/34) the cervical spine x-ray report recites a history of neck pain, injury three months earlier, and temporal headaches. The x-rays showed minor degenerative changes at C5-6. (PX 2, p. 12/34)

As previously instructed, Petitioner presented to Physical Therapists Clinic, Ltd. on June 1, 2012. According to the Initial Evaluation form, Petitioner reported that back in March he was at work trimming trees when he cut a large branch and the pole saw he was using slipped and the branch snapped toward him landing on his shoulders and the boom and pushing him down into his bucket. Petitioner had a really bad headache that day but was able to continue working with use of some aspirin. Since then Petitioner had been experiencing progressive pain and increasing headaches. Petitioner's headaches were now daily and he was experiencing burning between his scapulae and his central lower neck region. Petitioner also reported chronic tingling in his fingers bilaterally as well as some shoulder pain bilaterally. Petitioner also reported difficulty sleeping although the muscle relaxers were helping a little. Finally, Petitioner reported he was worse if he used his left arm away from his body. On examination, shoulder flexion and abduction was painful bilaterally. Cervical rotation, extension, and bending were painful. The therapist noted Petitioner's grip strength testing demonstrated a non-bell shaped curve bilaterally. Petitioner's rapid exchange grip testing results exceeded the normal anticipated results. Due to the latter findings, the therapist noted a possible inconsistent effort on Petitioner's part. Petitioner was scheduled for three visits a week to help with cervical range of motion. (PX 5)

Petitioner returned for physical therapy on June 4, 2012, reporting no change in his neck pain. At his June 6, 2012 visit he reported a very intense headache the day before. Stretching and manual techniques were utilized. (PX 5)

Petitioner signed his Application for Adjustment of Claim on June 6, 2012, alleging he injured his neck and low back on March 9, 2012 when he was stuck by a tree limb. (AX 2)

Petitioner returned to see Ms. Fry on June 7, 2012, reporting that therapy was of no long-term benefit. While it felt good, he would tighten right up afterwards. Movement of Petitioner's neck was reportedly very painful and his right arm had gone numb on the 6th after his therapy session. Range of motion increased his pain. Ms. Fry also noted that Petitioner had been trying to get hold of his boss but he would not return his call. Petitioner's physical examination was similar to his last one with painful range of motion and increased pain with right shoulder movement and reaching behind. Petitioner's left-sided pain was not as bad and he could go above 90 degrees. Petitioner was advised to continue his medications and therapy. He remained off work. Petitioner reported he was getting an attorney. Petitioner was to follow up after seeing a specialist. (PX 5)

When Petitioner next presented for therapy on June 8, 2012 he reported increased right arm pain after his June 6th visit. Modifications in stretching were utilized with no increased symptoms being reported. When Petitioner returned on June 11th he reported no change and feeling somewhat worse that particular day. Petitioner was only performing his stretching exercises once a day, rather than two to three times as recommended. As of June 13, 2012 Petitioner felt he was still worsening. He had a frontal headache that day with limited neck rotation. He had been compliant with cervical exercises. Gentle manual traction made his headache worse. Petitioner also believed his headaches were getting worse. (PX 5)

According to the physical therapy report of June 15, 2012 Petitioner was improving with much less of a headache the past couple of days but significant ongoing neck pain radiating to his scapular areas. As of June 18, 2012 Petitioner reported feeling really good on Friday but noting a significant increase in pain over the weekend and his entire right upper extremity went numb yesterday for no known reason. The numbness in Petitioner's left arm was primarily in the area of his biceps. Continued inconsistencies in grip strength testing was noted which the therapist indicated could be due to sub maximal effort. Petitioner's next therapy session was held on June 20, 2012. Petitioner reported experiencing right arm pain during the night which went away after he woke up and stretched a bit. After therapy Petitioner reported a mild decrease in his stiffness. (PX 5)

Petitioner continued with therapy through July 16, 2012. Petitioner had to cancel one appointment in late June of 2012 due to being pulled over with no valid driver's license. (PX 3) At his June 27, 2012 visit Petitioner reported he was scheduled to see Dr. VanFleet on July 16, 2012 but his case worker was trying to get him in sooner. Petitioner continued to note ongoing, fluctuating complaints of headaches and neck and back pain. In the final therapy note, the therapist reported that Petitioner originally complained of left arm pain; however, in mid-June it changed to the right upper extremity and Petitioner has had ongoing tingling intermittently on the right. Grip testing and rapid exchange grip both indicated inconsistent effort during testing. Petitioner's range of motion was noted to be "slightly" improved. While Petitioner's strength in his left arm had improved, Petitioner's right arm was worse than at his initial visit. Finally, Petitioner's progress was described as "limited recently."(PX 3)

Petitioner presented to Dr. VanFleet on July 17, 2012. As part of the examination, Petitioner completed a Spine Sheet in which he listed his injury date as April 11, 2012, and the injured body parts as his neck and back. Petitioner described the accident as follows: "Tree limb crashed down on my shoulders causing headaches, numbness in arms, upper back and lower back pain, and stiffness to neck." Petitioner denied having had any bed rest, traction, physical therapy exercises, chiropractic manipulation, injections, or pain medication. He acknowledged having taken Ibuprofen, Motrin, Advil, Aleve, Relafen, and/or Naprosyn but claimed none of them helped. Petitioner also completed a pain drawing in which he identified his complaints as headaches, neck pain, bilateral arm numbness, and mid to lower back pain of a burning, achy nature. Petitioner described his pain as an "8/10." When examined by Dr. VanFleet Petitioner provided a history of the incident with the tree branch noting it struck him on his back and while he was able to continue working, he did so with "tremendous" pain. Petitioner reported working until the end of May when he was unable to continue doing so secondary to pain across the base of his neck. Petitioner also reported that he was experiencing pain into his right arm and was having difficulty using his right arm and hand noting that his fingers and hand felt numb. Petitioner's current medications were Tramadol and Ibuprofen and he was undergoing physical therapy which was reportedly helping him. Petitioner denied any prior difficulties with his back and had been off work since May. On physical examination Petitioner had minimal range of motion and some giving-way on the right side. Dr. VanFleet believed Petitioner was suffering from cervical and thoracic strains. Wanting to rule out cervical stenosis the doctor recommended an MRI. He thought the strains should improve with time. (PX 4)

Petitioner underwent a cervical MRI on July 24, 2012. It revealed moderate central bulging at C5-6 which extended to the right of midline causing extra dural indentation of the thecal sac with mild spinal stenosis. Petitioner also had evidence of a mild central bulging disc at C6-7. (PX 2, p. 6/34)

Petitioner returned to see Dr. VanFleet on August 21, 2012. Petitioner reported ongoing pain in his right upper extremity consistent with the C5-6 disc disease shown on the MRI. He also had a C6 radiculopathy. Dr. VanFleet recommended a C5-6 anterior cervical discectomy and fusion with allograft bone and anterior cervical plating. Petitioner wished to think about it. (PX 5)

Petitioner telephoned Dr. VanFleet's office on August 28, 2012 requesting a work excuse. Petitioner was advised that Dr. VanFleet agreed to address his work status from the date of his initial visit and that the excuse would be mailed to him. Dr. VanFleet's records include a chart note of that date indicating "Petitioner has been off work since July 17, 2012 and remains off work until released. Awaiting MRI results." (PX 5)

At Respondent's request, Petitioner was examined by Dr. Robert Bernardi on December 12, 2012, in St. Louis, Missouri. Thereafter, a report was issued. (RX 1, dep. ex. 2) Petitioner denied any history of spine pain before the onset of his current symptoms which was on/about March 9, 2012. At that time Petitioner was working in a boom trimming trees above power lines. He cut through a large limb which fell onto him with two

branches striking the top of both of his shoulder and pushing him down into the bucket. With use of a chain saw, Petitioner was able to extricate himself. He denied any loss of consciousness and reported the event was witnessed. According to Petitioner he continued to work without restrictions after the accident until May 29, 2012 when he first sought medical care and was taken off work. Petitioner reported he had not returned to work since then.

Petitioner noted a severe headache immediately after the accident. He also noticed swelling in his neck associated with burning pain between his shoulder blades. Petitioner reported that his boss would not answer his phone call when he attempted to report his injury. According to Petitioner he woke up in late may with more intense pain and, again, reported the symptoms to his employer at which time he was told it was his responsibility to seek out medical attention. Petitioner then contacted an attorney and went to the local emergency room where he began a course of treatment as reflected in the medical records which Dr. Bernardi reviewed in his report.

Dr. Bernardi described Petitioner's symptom diagram as "unusual," noting Petitioner described paresthesias and aching pain involving the posterior aspect of the right side of his head with similar symptoms across the vertex of his skull. Petitioner also noted burning and aching pain along with paresthesias in the lower posterior cervical region and similar symptoms (along with stabbing pain) in the thoracic and lumbar spine. Petitioner also described burning and aching pain in the posterior aspect of both thighs and burning pain involving the anterior and posterior aspect of his left shoulder with aching pain along the left upper arm circumferentially. Similar symptoms, along with paresthesias and numbness, were noted in the entire right arm.

On examination Dr. Bernardi did not note any Waddell's signs. Petitioner's neck extension was limited to approximately fifty percent of normal and worsened his neck discomfort. Abduction of the left shoulder produced pain complaints along the suprascapular. Abduction and external rotation of the right shoulder resulted in popping of the joint. Petitioner's lower lumbar spine was slightly tender to palpation and straight leg raising on the right produced right posterior thigh pain complaints. Flexion and extension of Petitioner's hips also produced back pain complaints. Petitioner did not bring any imaging studies with him to the appointment.

Dr. Bernardi's diagnoses included: headaches of uncertain etiology; neck and non-radicular right arm pain of uncertain etiology; C5-6 and C6-7 disc disease; mid-back pain of uncertain etiology; thoracic degenerative disc disease; and low back and bilateral non-radicular leg pain of uncertain etiology. Dr. Bernardi recommended that some additional imaging studies be performed and really could not opine regarding the necessity of surgery until he reviewed Petitioner's MRI. He believed Petitioner's changes as described on the cervical MRI were degenerative in nature and not post-traumatic. The work-relatedness of Petitioner's symptoms was felt to be difficult to address. Dr. Bernardi noted Petitioner denied any prior history of spinal pain before his work accident and his history regarding the mechanism of injury has remained consistent across time and different examiners. Additionally, the mechanism of injury is certainly one that could plausibly produce neck/mid-back/low back pain. On the other hand, Respondent denied knowledge of Petitioner's injury until late May when he filed his claim. Dr. Bernardi noted Petitioner disagreed with that and told him his boss was aware of the accident and would not speak to him about it. He also noted in his report that Petitioner's claim was filed shortly after Petitioner was disciplined and suspended from work. While the mechanism of injury is certainly one that could produce spinal pain, his complaints were, in Dr. Bernardi's words, "really quite diffuse" extending from his skull, down his spine, and throughout all four extremities and remaining persistent and more severe with time, which is contrary to most post-traumatic spine pain which generally improves with time. Additionally, Dr. Bernardi noted Petitioner did not show any evidence of objective abnormalities on examination that would correlate with his symptoms and he noted in particular Petitioner's inconsistent effort during physical therapy which suggested a nonorganic factor might be influencing his presentation. With all of

the foregoing in mind, Dr. Bernardi concluded that if Petitioner's accident occurred as he described, it would be reasonable to conclude that it was responsible for his acute headaches, spinal and extremity pain. However, pending the review of imaging studies, he felt it would be difficult to attribute Petitioner's "now very chronic symptoms" to that accident.

Dr. Bernardi went on to address Petitioner's ability to work. Noting Petitioner's job as a tree trimmer was a very physically demanding and dangerous job and pending review of the additional studies, Dr. Bernardi did not believe Petitioner should be working full duty as a tree trimmer but should refrain from occupation driving, avoid climbing/overhead work, steer away from repetitive bending and twisting movements, and refrain from lifting more that 15 to 20 lbs. (RX1, dep. ex. 2)

Deposition Testimony of Dr. Timothy VanFleet(1/17/13)

Dr. VanFleet, an orthopedic surgeon specializing in spine surgery, testified that he evaluated Petitioner at the referral of Abby Frye, nurse practitioner. Dr. VanFleet testified consistent with his office notes as discussed above. Dr. VanFleet also testified that Petitioner's accident was the cause of his condition and his need to be off work. (PX 1, pp. 15-16, 19) While he testified that he had no opinion as of July 17, 2012 whether Petitioner was capable of working, he later testified that as of August 28, 2012 he kept Petitioner off work, noting that Petitioner had apparently been off work since July 17, 2012. (PX 1, pp. 14-15, 19) Dr. VanFleet testified that he has recommended that Petitioner undergo a cervical fusion and he attributed the accident to the need for that procedure because it aggravated Petitioner's pre-existing spondylosis resulting in Petitioner's persistent neck pain and radicular findings and complaints. (PX 1, pp. 18-20) Until Petitioner undergoes the surgery, Dr. VanFleet would not place Petitioner at maximum medical improvement. (PX 1, p. 22) Finally, Dr. VanFleet testified that his services were reasonable and necessary to treat petitioner's spine condition as aggravated by his accident. (PX 1, p. 22)

On cross-examination, Dr. VanFleet explained that it was his understanding Petitioner was struck on the top of the back of his thoracic spine and that it jarred him rather significantly. He was also under the impression Petitioner was able to work after the accident until the end of May when the pain at the base of his neck made him unable to continue working. (PX 1, pp. 24-25) acknowledged that Petitioner described pain in his right arm noting the fingers and hands felt numb. Dr. VanFleet was not aware that Petitioner had prior complaints of chronic numbness in his hands since a heart attack in 2009. Dr. VanFleet testified that he would have no way of knowing whether his complaints of numbness in his right hand were from his heart attack or from the alleged injury. (PX 1, p. 25)He clarified that the finding of giving way on the right side biceps and triceps during physical examination can be consistent with someone who is not providing a significant effort in a strength examination testing. (PX 1, p. 26)

Dr. VanFleet testified regarding a Physical Therapy Clinics note dated July 16, 2012, the day prior to his initial evaluation. That report documents Petitioner complaining of left arm pain. However, in mid-June, his complaints changed to the right upper extremity. Dr. VanFleet testified that this is not as commonly seen but not impossible. Dr. VanFleet also noted inconsistent effort on grip testing and rapid exchange grip. The significance of this finding is that it is consistent with Petitioner not providing 100% effort. Dr. VanFleet testified that this could occasionally impact his diagnosis and recommendations for treatment. (PX 1, pp. 28-30)

Dr. VanFleet testified that the MRI findings of moderate central bulging at C5-6 and mild central bulging at C6-7 are degenerative findings and that these can occur without injury or trauma. (PX 1, p. 30) Specifically, Dr. VanFleet testified that there was no evidence of acute degeneration or herniation in the cervical spine on the

MRI. In addition, Dr. VanFleet testified that his findings were consistent with what the radiologist found. However, Dr. VanFleet identified the MRI as showing bilateral foraminal stenosis at C5-6 secondary to an osteophyte but the radiologist's report specifically states there was no foraminal stenosis at C5-6. Dr. VanFleet did admit that this is inconsistent with his review of the film. Dr. VanFleet testified that disc osteophytes are bone spurs that are degenerative in nature and take months to years to develop. He also testified that Petitioner's foraminal stenosis at C5-6 is secondary to these disc osteophytes.

Dr. VanFleet testified that an individual with disc osteophytes can become symptomatic without any injury or trauma. Dr. VanFleet testified that his diagnosis of cervical radiculopathy and cervical disc disease with recommendations for surgery is based in part on Petitioner's complaints of numbness in the right upper extremity. Dr. VanFleet testified that Petitioner's degenerative condition could have become symptomatic absent any injury or trauma necessitating a need for surgery.

Petitioner underwent a thoracic MRI on February 5, 2013. While the report itself is not a part of the record, it appears to have shown mild multilevel degenerative disc disease with no focal abnormality and no spinal cord compression. On the axial images, there was no central or foraminal stenosis at any segment. (RX 1, dep. ex. 3)

Petitioner also underwent a lumbar MRI on that same date. At L4-5 there was mild to moderate degenerative disc disease and loss of disc hydration. There was possibly some slight loss of disc height and minimal posterior disc bulging. The other lumbar discs were entirely normal. No foraminal stenosis was seen on the parasagittal views. On the axial images, there was evidence of multilevel degenerative facet disease. No central, lateral recess, or foraminal narrowing at any segment was noted. (RX 1, dep. ex. 3)

Lumbar and cervical plain films were taken on February 11, 2013. Degenerative changes at L4-5 were noted. A heald L5 limbus vertebra was possible. The cervical films showed no evidence of scoliosis and on the lateral films, only minimal reduction of the normal cervical lordosis. (RX 1, dep. ex. 3)

Dr. Bernardi issued an addendum on May 28, 2013 after being provided with the new and older imaging studies and Dr. VanFleet's deposition transcript. (RX 1, dep. ex. 3) His diagnoses remained unchanged. While he believed the accident caused the acute pain for which Petitioner sought treatment in May of 2012 he could not conclude that it was the cause of his now chronic symptoms. He did not believe that persistent complaints equated with proof of injury. He did not feel there was any sound medical explanation for Petitioner's pain. While Dr. Bernardi did feel Petitioner's accident could have caused skeletal trauma he did not believe it do so in this instance in light of the imaging studies which showed no evidence of bony injury. He also did not believe the accident caused any ligamentous injury citing the same studies. He did not believe Petitioner's work accident aggravated Petitioner's pre-existing C6 degenerative foraminal stenosis nor could he attribute Petitioner's current symptoms to an aggravation of his pre-existing degenerative disc disease. While he acknowledged that Petitioner did have an objective abnormality at C5-6 (foraminal stenosis and degenerative disc disease), Petitioner's symptoms did not suggest that his foraminal stenosis was the source of his pain. In sum, Dr. Bernardi felt Petitioner had diffuse spinal complaints of uncertain etiology and inconsistent with any specific diagnosis. His x-ray findings and scans were age appropriate and he simply could not correlate them with the accident on March 9, 2012. He did not believe Petitioner had any radicular symptoms. He did not feel a fusion was appropriate to treat Petitioner's neck pain. He could not recommend the procedure nor did he feel Petitioner required any additional treatment as he was at maximum medical improvement and, objectively, was capable of working without restrictions. If Petitioner felt otherwise, Dr. Bernardi recommended a functional capacity evaluation. (RX 1, dep. ex. 3)

Dr. Bernardi opined that if Petitioner's work accident occurred as he alleged, he thought that it is reasonable to conclude it caused the acute pain for which he sought treatment in May 2012. However, Dr. Bernardi indicated he was unable to conclude that it was the cause of his now chronic symptoms. In Dr. Bernardi's opinion, there is no sound medical explanation for Petitioner's pain. Dr. Bernardi opined that there is no evidence of skeletal trauma and no evidence of ligamentous injury. He did feel that the work accident could have caused myofascial sprain/strain, but that this would not account for his chronic symptoms.

Dr. Bernardi further opined that Petitioner's foraminal stenosis was not symptomatic and that Petitioner did not have cervical radiculopathy as Petitioner lacked radiating arm pain that followed a dermatomal distribution and extended past his elbow. Petitioner described numbness that involved the middle three fingers of his right hand. According to Dr. Bernardi, an irritated C6 nerve root would produce numbness in the thumb. Petitioner did not have nerve root tension signs. He had normal strength and normal symmetric reflexes. Dr. Bernardi saw no reason to conclude that Petitioner's C6 foraminal stenosis was the source of his symptoms.

Dr. Bernardi also noted Petitioner had diffuse spinal complaints, the etiology of which was uncertain. Petitioner's symptoms were not consistent with any specific diagnosis and there were no objective abnormalities on his general physical or neurological exams. He also had presence of non-organic findings to include an inconsistent effort at physical therapy, and give way weakness when evaluated by Dr. VanFleet.

Dr. Bernardi opined that there was no solid medical evidence to support the utility of anterior cervical discectomy fusion and the management of cervical degenerative disc disease that is not associated with radiculopathy or myelopathy. He did not recommend that Petitioner have a cervical fusion. He opined that Petitioner did not require any additional treatment and had reached MMI from any symptoms he developed after the alleged injury on March 9, 2012. Dr. Bernardi concluded that there is no objective reason why Petitioner should not be capable of working without restriction. (RX 1, dep. ex. 3)

Deposition Testimony of Dr. Robert Bernardi (7.26.13)

Dr. Robert Bernardi, a neurosurgeon, testified consistent with his two reports. He testified that it was his understanding that Petitioner was trimming some power lines when a large limb fell on him pinning his head between the fork of the limbs with the limbs landing on his shoulders. Petitioner described experiencing an immediate headache, swelling in his neck and pain between his shoulder blades thereafter. (RX 1, p. 9) Having noted in his report that Petitioner had no evidence of a radicular problem, Dr. Bernardi explained that radiculopathy coming from a pinched nerve in one's neck generally results in pain concentrated along the inner border of the shoulder blade or beneath it which radiated down one's arm in a band-like dermatomal distribution. Sometimes it terminates as a numb and tingling sensation in one or two fingers of the hand and which finger is affected depends upon which nerve root is being compressed. (RX 1, p. 17) In all there is a very set of well-defined, distinct symptoms and physical findings accompanying radiculopathy and, according to Dr. Bernardi, Petitioner lacked those symptoms and findings. (RX 1, p. 18) Thus, he did not feel the surgery being recommended by Dr. VanFleet was appropriate. (RX 1, p. 18)

Dr. Bernardi also testified that when he initially examined Petitioner he thought it was reasonable to assume that Petitioner's acute symptoms were related to his work accident. However, he was uncertain as to whether his chronic and persistent complaints were related and, therefore, recommended, additional imaging studies. According to the doctor those studies did not show any evidence of ligamentous instability in Petitioner's neck or low back. Furthermore, the plain films did not show any signs of bony trauma or skeletal injury. (RX 1, pp. 19-20) With regard to the cervical MRI, it showed, at most, some degenerative disc disease and formainal stenosis at C5-6. (RX 1, p. 21) Thus, Dr. Bernardi concluded that Petitioner has degenerative disc disease in the

cervical, thoracic, and lumbar spine along with pain in those areas and headaches but they are of uncertain etiology and consistent with his age. (RX 1, pp. 21 – 22) He also explained that while the accident could have aggravated Petitioner's pre-existing degenerative disc disease it is usually a short-lived and well-tolerated process and one usually does not see persistent, severe, continuous, and disabling pain going on for weeks and weeks and months and months. Dr. Bernardi also felt it simply "unlikely" that Petitioner simultaneously aggravated his disc disease in his neck, thoracic, mid and low back when he had the accident. (RX 1, pp. 23-24)

On cross-examination Dr. Bernardi clarified that while most people over the age of forty have evidence of arthritis he agreed that most people don't' have evidence of bilateral stenosis at C5-6. (RX 1, p. 27) He further acknowleged that if Petitioner's accident history was accurate it would have caused a temporary exacerbation of some degenerative conditions in Petitioner's cervical spine which returned to his pre-injury level at some point. (RX 1, p. 29) He also clarified that he cannot say the proposed surgery is unreasonable but he does think it's not necessary. (RX 1, p. 32) He also acknowledged that the mechanism of injury, if accurate, could aggravate degenerative stenosis in one's spine. (RX 1, p. 32) He also explained that the problem he has with Petitioner's case is that Petitioner's history is not consistent with an aggravation of degenerative disc disease. According to Dr. Bernardi, an aggravation is usually accompanied by severe/bad pain which diminishes to a lower level and may persist at that lower level but it always improved. In Petitioner's case, it's not that he's had chronic or continuous neck pain, it's the fact it has never remitted in any way during the entire time. (RX 1, p. 35)

On redirect examination Dr. Bernardi testified that Petitioner was not taking any pain medications when initially seen on December 12, 2012. (RX 1, p. 42)

Arbitration

Testimony of Petitioner

Petitioner testified that he is 42 years old and resides in Whitehall, Illinois. He was employed with Respondent as a tree trimmer in March of 2012, having started for Respondent seven to eight years earlier. Petitioner's job duties as a trimmer included trimming the trees around power lines, climbing trees, and performing ground work. He regularly used chainsaws, ropes and saddles. The chainsaws weighed anywhere from 15 to 50 lbs. He was also required to cut trees up in the air for which he used a bucket truck and a 65 foot boom.

When asked if he had ever had problems with his neck or back prior to March 9, 2012 Petitioner testified that he always had pain in his back due to the nature of his job. Petitioner testified that he performed his job climbing trees although when his back "got to hurting" he would save the climbing activities for the end of his circuit (ie., shift/day). Petitioner testified he would climb the trees, "kind of" lean back on his ropes and saddle and it would pop his back from the bottom all the way up to the top. Despite the foregoing, Petitioner denied seeking any medical treatment for those complaints before March 2012.

Petitioner testified that Respondent is owned by Garrett Funk, also known as Gary. Mr. Funk was Petitioner's supervisor the entire time he worked for Respondent.

Petitioner testified that on or about March 9, 2012, he was working with Derek Boxdorfer when he was injured. As Petitioner explained it, he was in the boom above some power lines approximately 50 feet off the ground. He was cutting through a limb when he stopped and turned around to grab the joystick on the boom and the limb fell on him. Petitioner testified he did not know how much the limb weighed. Petitioner testified that he pushed the limb up and used his chainsaw to take pieces off of it. His pole saw was reportedly smashed. Petitioner was able to get back down on the ground with the boom.

Petitioner testified that Derek, his ground man, had seen "it" and was kind of upset and trying to figure out what to do. According to Petitioner, Derek was yelling at him and at first he didn't respond but then he did and told Derek not to move anything due to the position Petitioner found himself in (ie., the tree limbs were almost touching the wires). Petitioner then testified that "after he came to" he pushed the limb up and off him he was able to get his chain saw and start taking little pieces of tree limb one by one. Eventually he was able to get out and get down to the ground. At that point he was pretty dazed and had a "really massive headache." Petitioner testified they then decided they needed to go and call Gary to let him know and so they folded up the boom and moved the truck to a location where they had reception on his cell phone.

Petitioner testified that he then attempted to contact Gary Funk, but he would not answer his phone and his voicemail was full so he couldn't leave a message.

Petitioner denied having any communication with Mr. Funk during that remaining two months of his employment with Respondent.

Petitioner testified that he did not seek any medical care that day and did not miss any time from work. He continued to work through March, April, and May of 2012.

Petitioner testified that in the first part of April, he received a call from Gary Funk wanting to know if he could work at Bodine, a factory. Petitioner expressed interest as Bodine was a good paying job. When Petitioner got to Bodine to work that day, he had a conversation with Mr. Funk about trimming and dragging brush. Petitioner was asked which activity he wanted to do. Petitioner testified that he told Mr. Funk he could not drag any brush because after the limb hit him at Pearl, he did not feel like he needed to be dragging any brush. According to Petitioner, Gary then walked away.

Petitioner testified that he told Gary about the branch falling on him. When asked if there was a detailed conversation, Petitioner testified there wasn't. It was just like I just said."

Petitioner testified that thereafter in May of 2012 he began having severe pain in his back. According to Petitioner he would go about his routine doing his ground work first and then beginning his climbing and he noticed his back would not pop and it just felt like "fire." Petitioner also testified to the onset of numbness in his fingers on his right hand, a sensation he denied experiencing before the accident. Petitioner testified that he called Gary Funk and told him he would not be coming in due to his neck. Petitioner testified that he subsequently went to Jacksonville Passavant Hospital for the first time at the end of May 2012. He received an injection and was referred to Abby Fry, a nurse practitioner.

Petitioner explained that he didn't get any treatment before this time because he is the type of person who thinks he is a "Superman" and can keep going without even thinking about his problems. Consequently, he tried to work through the pain.

Petitioner testified that he attended physical therapy. Petitioner also testified that his condition worsened while he underwent physical therapy. His migraines went "berserk" and while he would feel better during therapy he would start getting migraines and back pain when he got home.

Petitioner testified that Abby Fry subsequently referred him to Dr. VanFleet in July of 2012. Dr. VanFleet has recommended cervical spine surgery. Petitioner testified that he last worked on or around May 17th or 18th of 2012. He testified that Dr. VanFleet took him off of work on July 17, 2012.

Petitioner also testified that he could not explain why he told Dr. VanFleet his accident occurred on April 11, 2012. He believed he must have been confused "or something."

Petitioner testified that he still has back and neck pain. His lack of sleep has been tremendous and he sleeps with his arm straight out which he has never had to do before, having previously been a stomach sleeper. Petitioner denied being able to get comfortable when sleeping and his arm would go to sleep.

Petitioner testified that his bills from Dr. VanFleet, Passavant Hospital, and physical therapy are unpaid.

On cross-examination Petitioner testified that the accident occurred about 7:00 in the morning. He thought the conversation with Gary regarding the Bodine factory work and the accident occurred around April 3-4. When asked if that was the only conversation he had with Gary about the incident, Petitioner testified "I don't even talk to or even see Gary...." He denied seeing Gary or having any conversations with him during the two months he continued working for Respondent. He testified he tried to call him on other occasions but Gary wouldn't answer his phone. He believed those attempts occurred every Monday morning when he needed fuel. According to Petitioner, Gary simply wouldn't answer his phone. Petitioner also testified that before the accident Gary would talk with him but after the accident they had no conversations regarding Petitioner's job duties.

On further cross-examination Petitioner acknowledged that from May 21st through May 25th he was suspended from his job without pay because Petitioner had supposedly "cussed" out a customer. The following Monday after his week's suspension was Memorial Day. Petitioner testified that on Tuesday, May 29th he called Gary and told him he wasn't going to make it into work. He didn't actually remember the conversation but he did recall telling him he wouldn't be in that day due to his neck. He did not recall having any conversation with Gary that day concerning his employment status. He did not recall if Gary fired him that day or told him not to return to work. He didn't recall any such conversation with Gary; however, it is his understanding that he was fired. That same Tuesday was the first day Petitioner sought medical care.

Petitioner acknowledged that Respondent had a post injury drug policy and that he had experienced "issues" with that policy in the past. According to Petitioner, he was the only one that took one and passed it. There was also a time when he was asked to take one but refused. He was then fired by Respondent but rehired because he was needed. Thus, Petitioner knew that at the time of his injury on March 9, 2012 he would have had to take a post injury drug test. One has never been taken, however.

Petitioner also acknowledged having a heart attack in 2009 and getting stents. Following that he did experience chronic complaints of numbness and tingling in his upper extremities bilaterally.

Petitioner also agreed that some time during his physical therapy his arm complaints switched from the left arm to the right arm. While he told Dr. VanFleet he was injured on April 11, 2012 Petitioner could not recall anything happening on that date. He simply gave the wrong date.

Petitioner also testified that while he hasn't gone back to see Dr. VanFleet since August of 2012 he has spoken with his nurse. Petitioner testified that he called the nurse shortly after he tried to call Gary in August of 2012 about going back to work but that went "nowhere." According to Petitioner, Gary told him he had nothing to say to him, that he needed to call workman's comp or his corporation and that he should turn his saw in. He then called Dr. VanFleet's office to talk to them about going back to work. When asked if he called the Dr.'s office to e released to go back to work, Petitioner denied same. Rather, he wanted an excuse so he could "save his job"

and go back to work light duty. Petitioner denied speaking with anyone other than Gary about working. He denied doing any roofing jobs.

On redirect examination Petitioner was asked to explain why he didn't take a drug test the day he got hit. According to Petitioner, nobody else had ever taken a drug test for Gary. Petitioner also explained the difference in his hand symptoms before and after the accident, most notably that he couldn't close his hands after his heart attack. After his March 2012 accident, the numbness just stayed in his fingers. During the therapy his left-sided arm symptoms improved.

Petitioner testified that he hasn't proceeded with the surgery because he has no way to pay for it.

Testimony of Derek Boxdorfer

Derek Boxdorfer testified on behalf of Petitioner. Mr. Boxdorfer is 28 years old and resides in Hardin, Illinois. In March 2012 he was employed at Funk Pest Control & Tree Service as a ground helper. His supervisor was Gary Funk, the owner. He testified that he worked with Petitioner having started just a few weeks earlier after returning from a hand injury. Mr. Boxdorfer testified that on March 9, 2012 he was working with Petitioner while Petitioner was in the bucket trimming a tree. Mr. Boxdorfer testified that his back was actually turned to him at the time, but when he turned around and looked, Petitioner was covered in the bucket by a limb that had fallen. Petitioner was crouched down in the bucket with the limb resting on top of the bucket. He did not actually see the limb hit Petitioner. Mr. Boxdorfer testified that Petitioner got the limb pushed off of the bucket and got the bucket down to the truck. It took a couple of minutes for Petitioner to gather himself. Shortly thereafter, they went up the road to use their cell phone to try to get a hold of Mr. Funk. They were not able to reach him.

Mr. Boxdorfer testified that he continued to work with Petitioner for the next couple of weeks but then he had some days off because of some incident. Mr. Funk brought a couple of other guys over to work with him.

Mr. Boxdorfer did testify that he continued to work with Petitioner in the month of April 2012, but that he was not working like his usual self. Mr. Boxdorfer described Petitioner as a "go-getter" but during this time after the accident Mr. Boxdorfer did most of the work (ie., the trimming) and Petitioner would help drag the bush {**} According to Mr. Boxdorfer they were not working their normal workload.

Mr. Boxdorfer also testified that he himself never tried to call Gary Funk about Petitioner's injury because Gary would not answer the phone because of his hand injury or speak with him whatsoever. Mr. Funk would tell him where to go and work but that was about it.

Mr. Boxdorfer testified that he had his own personal worker's compensation injury. He was drug tested after that injury at the hospital. He also testified that Mr. Funk filled out the accident report or Form 45 for him after his work injury. When asked if he ever heard Mr. Funk talk about Petitioner's injury, Mr. Boxdorfer testified that about a month after the alleged incident, he heard Mr. Funk say something about Petitioner's injury in the shop to which Mr. Boxdorfer replied that the accident did happen. Thereafter, Mr. Funk kind of shut his mouth and went on.

Mr. Boxdorfer testified that he no longer works there because he did not feel comfortable any longer after his accident. Mr. Boxdorfer's wife was also employed by Respondent but left but she too was not happy with her employment there.

Testimony of Garrett Funk

Garrett Funk testified on behalf of Respondent. Mr. Funk owns Funk Pest Control & Tree Service and has since 1986. The company does residential and commercial pest control and tree service, mostly contract utility line clearing. At the present time, he has 14 employees. He testified Petitioner used to work for him. He last worked for Mr. Funk in May 2012.

Mr. Funk testified that he fired Petitioner around May 20, 2012. Petitioner was suspended the week of May 20, 2012 after which he was supposed to return to work. Petitioner was suspended following a complaint about his language and actions at a job site. He also left work early. He was suspended for a week without pay from May 21st to May 25th, 2012. Mr. Funk testified that he had conversation with Petitioner on Tuesday, May 29, 2012. According to Mr. Funk, Petitioner did not show up to work that day and Mr. Funk called to ask him what was going on. Mr. Funk testified that Petitioner told him he didn't think he was being treated fairly and Mr. Funk told Mr. Holder that he was no longer employed by his company due to the complaints from the utility company. Petitioner did not tell Mr. Funk about a work injury during that conversation.

Mr. Funk went on to testify that he first learned of the alleged work injury the following day on May 30, 2012. At that time, Mr. Funk called the Petitioner wanting to know where his chainsaw was. At that time, Petitioner told Mr. Funk that he had to go to the doctor because of injuries he sustained. He did not advise Mr. Funk on the date that he was injured, but just said that it was about a month prior. He told him he got hit by a tree limb.

Mr. Funk denied having any conversations with Petitioner prior to May 30, 2012 about an alleged work injury. He also denied hearing from any other employees about an alleged work injury.

Mr. Funk testified that he does have frequent communication with his employees, specifically Petitioner. He testified that he would go out at least once a week and put fuel in the trucks. He would usually meet them at a gas station to fuel the trucks up. Then every two weeks they would have to collect time sheets. At no time during any of these meet ups did Petitioner report a work injury. Mr. Funk testified that he talked to Petitioner a couple of times a week on the phone during which time he never reported a work injury.

Mr. Funk testified that there is a drug testing policy in place and that they do require post-injury drug testing. His employees are aware of this policy as they fill out a sheet when they are hired and are given a yellow card to carry in their wallet that has all of the contact information for corporate resources who handles their worker's compensation claims.

Mr. Funk testified that Petitioner did not have any post-injury drug testing as the injury was first reported to him on May 30th and he was no longer an employee.

Mr. Funk testified that he saw Petitioner working for Jeremy Campbell doing shingling on a roof. He believes this was in April 2013, but is not specific about the date.

Mr. Funk denied being told by Petitioner of a work injury during their conversations about work at the Bodine factory. Petitioner helped perform some tree trimming there; although he most ran the bucket truck.

Mr. Funk testified that Derek Boxdorfer also was an employee for his company. Mr. Boxdorfer had his own work-related injury for which he completed an accident report and provided treatment. Mr. Boxdorfer also

participated in a post-injury drug test. Mr. Boxdorfer's wife also worked for Funk Pest Control & Tree Service. He testified that they were having some issues with her and they cut back her hours following which she quit her employment.

Petitioner's medical bills were admitted as PX 6 – 9. [1]

The Arbitrator concludes:

The crux of this case was probably best summed up during Dr. Bernardi's deposition when the doctor was asked if the primary question was "...do you believe him [Petitioner] or don't you believe him?" The Arbitrator has concluded that she does not believe Petitioner. The accident may have occurred but not necessarily on March 9, 2012. Furthermore, the Arbitrator does not buy into the chronicity of Petitioner's complaints allegedly stemming from any accident.

(1) (Issue C – Accident).

Petitioner failed to prove he sustained an accident on March 9, 2012 that arose out of and in the course of his employment with Respondent. The Arbitrator is not entirely convinced by a preponderance of the credible evidence that Petitioner actually had an accident on March 9, 2012. To begin with, neither Petitioner nor Mr. Boxdorfer were completely sure when the incident occurred. Petitioner told medical personnel at Passavant Hospital that it was early March. Petitioner told Dr. VanFleet his accident date was April 11, 2012. Mr. Boxdorfer's testimony is more suggestive of an April date since he believed they only continued to work for a few more weeks before Petitioner lost time due to an "incident' at work. This would correlate with his time off work in May. Mr. Funk also credibly testified that when he first learned of the alleged accident on May 30, 2012 Petitioner told him it had occurred about a month earlier.

Second, Petitioner's credibility is suspect as the Arbitrator notes discrepancies in the history provided to Dr. VanFleet (date of accident, denial of prior back problems, and the reason he stopped working in May). Petitioner denied any prior problems or difficulties with his back or neck when initially seen by Dr. VanFleet. However, at the arbitration hearing Petitioner testified that he has <u>always</u> had back pains due to the nature of his job and then he went on to describe how he would "pop" his back from the bottom to the top. Petitioner was not forthright with Dr. VanFleet when he told him he stopped working in late May due to neck pain, these statements suggesting that it was neck pain which prohibited Petitioner from continuing to work rather than a personnel issue. On cross-examination Petitioner testified that from March 9th to the end of May he had no communication with his supervisor (ie., Mr. Funk) regarding his job duties. However, he also acknowledged conversations with Mr. Funk in early April regarding the "Bodine" job.

In support of his testimony regarding accident, Petitioner presented Derek Boxdorfer; however, Mr. Boxdorfer's testimony is equally suspicious as he seemed more focused on supporting his former co-worker and undermining his former boss for whom he certainly felt some ill-will stemming from how he and his wife had been allegedly treated while employed by Respondent. The Arbitrator also notes Mr. Boxdorfer acknowledged he wasn't good with dates and his time line was not consistent with Petitioner's testimony thereby casting doubt as to when, and if, the accident occurred. If not good with dates, what else might he not be good at remembering? For example, while Mr. Boxdorfer testified that Petitioner was not the same worker after the accident as before, he further testified that after the accident he would trim the trees while Petitioner would drag the brush. Yet, Petitioner testified that when Mr. Funk spoke with him about whether he wanted to trim trees or

[1] PX 9 is not marked.

drag brush at the "Bodine" job, Petitioner testified that he declined to drag brush because that wasn't something he felt he should be doing after the limb had fallen on him at Pearl. Why would he decline to drag brush at Pearl when he had been doing that very activity instead of trimming trees, according to Mr. Boxdorfer? Their testimony is contradictory and suspect.

Petitioner also testified that he was aware of a company drug testing policy. Prior to this alleged accident, Petitioner refused to take a drug test at the request of Respondent. Petitioner was then terminated. He was, however, subsequently re-employed by Respondent. Petitioner testified that he was aware that he would be required to take a post-injury drug test following the alleged March 9, 2012 injury had he reported it to Mr. Funk. Petitioner also testified that "nobody else has ever taken a drug sample for Gary Funk.....Gary has never drug tested anybody straight up." This testimony by Petitioner is in direct contradiction to that of Mr. Boxdorfer who testified that he did, in fact, take a drug test after his own workers' compensation injury while employed by Respondent. Again, Petitioner's testimony is suspect.

Finally, the Arbitrator notes that Petitioner testified he lost a pole saw in the accident because it was smashed. Yet, no evidence of a broken/smashed pole saw was otherwise presented nor was there any testimony concerning the replacement of same or reporting of same – all of which could have corroborated Petitioner's testimony regarding an accident having occurred and when.

Petitioner's credibility and motivation is further undermined by his efforts to stay off work and to then return to work. Dr. VanFleet did not take Petitioner off of work or place him on light duty restrictions when he initially examined him. Furthermore, when Dr. VanFleet examined Petitioner on August 21, 2012 he made no mention of Petitioner needing to be off work. It was not until Petitioner telephoned Dr. VanFleet's office on August 28, 2012, stating he needed a work excuse that Dr. VanFleet issued same.

Petitioner also testified that he tried to return to some type of restricted work a month or so after he last saw Dr. VanFleet. Petitioner testified that he called Dr. VanFleet's office after his last evaluation in August of 2012 to go back to work, specifically requesting an excuse "so I could go back to work." That is not documented in Dr. VanFleet's records. Petitioner als testified that he made no other attempts to find employment despite his desire to return to work. This testimony is inconsistent with Mr. Funk's testimony that Petitioner was observed working on a roof during the time of his alleged entitlement to temporary total disability benefits. Under these circumstances Petitioner's motivation for seeking a work excuse and a return to work slip is suspicious. Again, Petitioner's credibility is suspect.

(2) Issue F – Causal Connection).

Even assuming, arguendo, that Petitioner sustained an accident on March 9, 2012, Petitioner failed to prove a causal connection between his current condition of ill-being in his neck and low back and his accident of March 9, 2012. This conclusion is based upon Petitioner's lack of credibility concerning the ongoing chronic nature of his injury and symptoms, and the testimony and opinions of Dr. Bernardi which are deemed more persuasive than those of Dr. VanFleet.

Petitioner continued to work full duty as a tree trimmer after his March 9, 2012. He testified that his job required the use of chain saws, ropes, and saddles. The chain saws weighed anywhere from 15 to 50 pounds. Petitioner was required to climb trees and work in and around a boom truck. While his former co-worker, Derek Boxdorfer testified that Petitioner was not the worker he used to be, that testimony is not entirely believable to this Arbitrator. Mr. Boxdorfer candidly admitted he wasn't real good with dates and details. He also appeared to

have an axe to grind with Respondent stemming from the manner in which he was treated by Respondent after his own workers' compensation claim as well as how his wife was treated by Respondent when she worked there. Petitioner did not seek any medical treatment, complete an accident report, or undergo a post-injury drug test. In light of the heavy physical nature of Petitioner's job and his lack of medical treatment (or need for any pain medication) during the several months he continued to work for Respondent the Arbitrator is unable to conclude that Petitioner's accident resulted in chronic ongoing complaints and symptoms.

It was not until Petitioner was suspended and terminated by Respondent that he began treating for injuries he claimed stemmed from his accident. Even then, inconsistencies appeared, especially as Petitioner began treating with Dr. VanFleet. First, Petitioner told Dr. VanFleet he stopped working in May on account of his injuries. As discussed above, that is not true. He was suspended and then terminated. Second, when Petitioner was seen by Dr. VanFleet he referenced an accident in April of 2012. When asked to explain why he gave that date to the doctor, Petitioner had no real explanation other than to say he had been confused or "something" that day and didn't know why he put it down. Petitioner also led Dr. VanFleet to believe he had never had any problems with his back or neck before March 9, 2012. However, his testimony at arbitration was to the contrary. Dr. VanFleet relied upon these representations in providing certain opinions. Those opinions are not persuasive in light of the inaccuracies upon which they were based.

Additionally, there is a question as to the extent of any injuries Petitioner might have sustained in the accident. Petitioner testified to a massive headache at the time of the accident and nothing more. He further testified that he then began to notice his back would not pop (as it would before the accident) when doing his circuits. He also testified that he started having problems with his right arm. However, medical records and therapy records from Petitioner's early treatment visits indicate Petitioner had left arm complaints. They then switched to the right arm. Again, Petitioner's testimony is not consistent with the objective medical records.

Both Dr. VanFleet and Dr. Bernardi agreed that Petitioner's condition of ill-being in his neck was degenerative in nature. Both testified that there was no evidence of any acute injury to Petitioner's cervical spine. Petitioner's current condition of ill-being is bilateral foraminal stenosis at C5-6 with some mild central stenosis or narrowing secondary to disc osteophyte, a degenerative condition. Dr. VanFleet has recommended surgery to address Petitioner's subjective complaints, but admitted that Petitioner's condition could have become symptomatic absent any trauma or injury. In addition, Dr. VanFleet admitted that it was not even possible to determine if Petitioner's right arm complaints of numbness were, in fact, related to the degenerative condition in his neck or to his un-related heart attack in 2009 that led to ongoing upper extremity complaints of numbness, which Petitioner does not dispute. Both Dr. VanFleet and Dr. Bernardi identified non-organic findings during physical examination that include give-way weakness, inconsistent effort in physical therapy which calls into question the reliability of Petitioner's subjective complaints. In addition, Dr. Bernardi found no objective evidence of any abnormalities on neurological or physical examination. Finally, the Arbitrator notes that Dr. VanFleet's opinions are based upon inaccuracies in Petitioner's history.

Based upon the foregoing, the Arbitrator concludes the testimony of Dr. Bernardi is more credible than that of Dr. VanFleet and Petitioner has failed to prove that his current condition of ill-being is causally connected to his alleged work accident of March 9, 2012.

Petitioner's claim for compensation is denied. No benefits are awarded. All other issues are moot.

****

STATE OF ILLINOIS)
) SS.
COUNTY OF PEORIA)

☒ Affirm and adopt (no changes)	☐ Injured Workers' Benefit Fund (§4(d))
☐ Affirm with changes	☐ Rate Adjustment Fund (§8(g))
☐ Reverse	☐ Second Injury Fund (§8(e)18)
	☐ PTD/Fatal denied
☐ Modify	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Ronald Giddens,

Petitioner,

14IWCC0379

vs.

NO: 11 WC 37109

Konica Minolta,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review under §19(b) having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issues of causal connection, temporary total disability, prospective medical care, and medical expenses, and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof. The Commission further remands this case to the Arbitrator for further proceedings for a determination of a further amount of temporary total compensation or of compensation for permanent disability, if any, pursuant to Thomas v. Industrial Commission, 78 Ill.2d 327, 399 N.E.2d 1322, 35 Ill.Dec. 794 (1980).

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed August 29, 2013 is hereby affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that this case be remanded to the Arbitrator for further proceedings consistent with this Decision, but only after the latter of expiration of the time for filing a written request for Summons to the Circuit Court has expired without the filing of such a written request, or after the time of completion of any judicial proceedings, if such a written request has been filed.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner interest under §19(n) of the Act, if any.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall have credit for all amounts paid, if any, to or on behalf of Petitioner on account of said accidental injury.

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $75,000.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: MAY 2 1 2014

Michael J. Brennan

Thomas J. Tyrrell

Kevin W. Lamborn

MJB:bjg
0-4/21/2014
052

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF 19(b) DECISION OF ARBITRATOR

14IWCC0379

GIDDENS, RONALD
Employee/Petitioner

Case# 11WC037109

KONICA MINOLTA
Employer/Respondent

On 8/29/2013, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.06% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

A copy of this decision is mailed to the following parties:

0724 JANSSEN LAW CENTER
JAY H JANSSEN
333 MAIN ST
PEORIA, IL 61602

1685 KOPKA PINKUS DOLIN & EADS PC
BRIAN J KAPLAN
100 LEXINGTON DR SUITE 100
BUFFALO GROVE, IL 60089

14IWCC0379

STATE OF ILLINOIS)
)SS.
COUNTY OF PEORIA)

☐ Injured Workers' Benefit Fund (§4(d))
☐ Rate Adjustment Fund (§8(g))
☐ Second Injury Fund (§8(e)18)
☒ None of the above

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

RONALD GIDDENS
Employee/Petitioner

v.

KONICA MINOLTA
Employer/Respondent

Case # **11** WC **37109**

Consolidated cases: _____

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Stephen Mathis**, Arbitrator of the Commission, in the city of **Peoria**, on **6/24/13**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. ☐ Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. ☐ Was there an employee-employer relationship?
C. ☐ Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. ☐ What was the date of the accident?
E. ☐ Was timely notice of the accident given to Respondent?
F. ☒ Is Petitioner's current condition of ill-being causally related to the injury?
G. ☐ What were Petitioner's earnings?
H. ☐ What was Petitioner's age at the time of the accident?
I. ☐ What was Petitioner's marital status at the time of the accident?
J. ☒ Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. ☒ Is Petitioner entitled to any prospective medical care?
L. ☒ What temporary benefits are in dispute?
☐ TPD ☐ Maintenance ☒ TTD
M. ☒ Should penalties or fees be imposed upon Respondent?
N. ☐ Is Respondent due any credit?
O. ☐ Other _____

FINDINGS

On the date of accident, **5/2/11**, Respondent *was* operating under and subject to the provisions of the Act.

On this date, an employee-employer relationship *did* exist between Petitioner and Respondent.

On this date, Petitioner *did* sustain an accident that arose out of and in the course of employment.

Timely notice of this accident *was* given to Respondent.

Petitioner's current condition of ill-being *is* causally related to the accident.

In the year preceding the injury, Petitioner earned $; the average weekly wage was $**595.00**.

On the date of accident, Petitioner was **52** years of age, *married* with **0** dependent children.

Respondent ***has not*** paid all reasonable and necessary charges for all reasonable and necessary medical services.

Respondent shall be given a credit of $**10,606.94** for TTD, $ for TPD, $ for maintenance, and $**6,986.82** for other benefits, for a total credit of $**17,593.76**.

Respondent is entitled to a credit of $**0.00** under Section 8(j) of the Act.

ORDER

Respondent is liable for the C5-C6 and C6-C7 ACDF (Anterior cervical discectomy with interbody arthrodesis) recommended by Dr. O'Leary. Further, Respondent should pay all related medical expenses for the anterior interbody fusion recommended by Dr. Patrick O'Leary.

Respondent shall pay Petitioner temporary total disability benefits of $396.66/week for 81 5/7 weeks, commencing 11/28/11 through 6/24/13, as provided in Section 8(b) of the Act.

Respondent shall be given credit for $10,606.94 for TTD benefits paid.

Respondent shall pay reasonable and necessary medical services, pursuant to the medical fee schedule, for the following medical bills, as provided in Sections 8(a) and 8.2 of the Act:

Advanced Medical Transport, #11-19428	$827.00
Methodist Medical Center, #11122-00412	$571.00
Dr. John Lovell, #6934	$110.00
Bruns Chiropractic Office, #1001725	$48,391.81
IL Regional Pain Institute, #7419	$8,729.00
IWP #133754	$753.60
Midwest Orthopaedic Center, #310682	$1,050.00
IPMR, #332520	$1,742.00
Peoria Day Surgery Center, #425029	$5,514.00
TOTAL:	**$67,688.41**

Respondent shall be given a credit of $6,986.82 for medical benefits that have been paid, and Respondent shall hold petitioner harmless from any claims by any providers of the services for which Respondent is receiving this credit, as provided in Section 8(j) of the Act.

Respondent shall pay to Petitioner penalties of $0 as provided in Section 19(k) of the Act.

In no instance shall this award be a bar to subsequent hearing and determination of an additional amount of medical benefits or compensation for a temporary or permanent disability, if any.

RULES REGARDING APPEALS Unless a party files a *Petition for Review* within 30 days after receipt of this decision, and perfects a review in accordance with the Act and Rules, then this decision shall be entered as the decision of the Commission.

STATEMENT OF INTEREST RATE If the Commission reviews this award, interest at the rate set forth on the *Notice of Decision of Arbitrator* shall accrue from the date listed below to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

S J Maths
Signature of Arbitrator

8-22-13
Date

ICArbDec19(b)

AUG 29 2013

IN SUPPORT OF THE ARBITRATOR'S MEMORANDUM OF DECISION, THE ARBITRATOR MAKES FINDINGS REGARDING THE FOLLOWING ISSUES:

-(F) - Is Petitioner's current condition of ill-being causally related to the injury?

-(J) - Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?

-(K) - Is Petitioner entitled to any prospective medical care?

-(L) - What temporary benefits are in dispute?

☐TPD ☐Maintenance ☒ TTD

-(M) - Should penalties or fees be imposed upon Respondent?

STATEMENT OF FACTS

Direct Examination of Petitioner

Petitioner testified he worked for Konica Minolta as a service technician for copying machines. Petitioner testified he was coming from OSF to the Human Service Center on Fayette St. to service a copy machine at the time of the accident. Petitioner testified he was driving on Glen Oak Ave. when a vehicle turned left in front of him.

Petitioner testified he had to be extricated from the vehicle after the accident. Petitioner testified he was taken by ambulance to Methodist Medical Center with a laceration to his head.

Petitioner testified he followed up his care with his family physician, Dr. Lovell. Petitioner testified he continued to have pain and sought treatment with Dr. Michael Bruns. Petitioner testified that Dr. Bruns performed x-rays, therapy, adjustment, ultrasound and continues with this treatment through the present. Petitioner testified Dr. Bruns referred him to Dr. Russo and Dr. Kevin Henry.

Petitioner testified Dr. Henry prescribed medications and did several nerve injections. Petitioner testified he was seen by Dr. Patrick O'Leary due to continued complaints of pain, who recommended C5-C6 and C6-C7 anterior cervical diskectomy with interbody arthrodesis. Petitioner testified he had not had the surgery, as it has not been approved by work comp, but that he would like to proceed with the surgery.

Petitioner did testify that he received temporary total disability benefits through 11/28/11. Petitioner testified that he was informed by his employer on 9/27/11 that his employment was terminated due to the Respondent's inability to accommodate the Petitioner's restrictions due to "business necessity".

Petitioner further testified he has not been employed since 9/27/11.

Petitioner testified his current symptoms are chronic pain in his neck all the time.

Cross-exam of Petitioner

On cross-examination, Petitioner testified he had pain in his neck and shoulders. Petitioner further testified that his treatment with Dr. Bruns hadn't changed much and his symptoms remained about the same.

Petitioner testified he was diagnosed with degenerative disc disease prior to the motor vehicle accident, but was never diagnosed with spondylosis.

Petitioner further testified that Dr. Bruns kept him off work, as well as Dr. Henry and Dr. O'Leary. Petitioner further testified that his employment was terminated due to work restrictions. Petitioner testified that he only worked a couple of days after the accident, was unable to continue and has not worked since May 2011. Petitioner testified he was given work restrictions of 4 hours per day, but could not work within those restrictions.

Petitioner testified he applied for unemployment benefits, but was denied. Petitioner further testified he has not sought employment since November 2011.

Petitioner testified that Dr. Bruns' treatment did not improve his condition, but provided only temporary pain relief.

Petitioner testified he had no prior injuries prior to the motor vehicle accident of 5/2/11.

Direct examination of Dr. Henry

Dr. Kevin Henry testified he was a physician in anesthesia pain management and licensed since 2006. Dr. Henry testified he performed his residency at John Hopkins in Maryland.

Dr. Henry testified that he treated the Petitioner with medications, facet blocks, de-nervating nerves, and temperization until he could be seen by the surgeon. Dr. Henry further testified that he performed median branch blocks and burned his nerve, which did not provide complete relief. Dr. Henry referred Petitioner to Dr. Patrick O'Leary, a spinal surgeon.

Dr. Henry testified the Petitioner had been treated conservatively from the date of the accident through the present time with complaints of right-sided neck pain, inability to turn his head, and shoulder pain.

Dr. Henry testified that his treatment and charges are reasonable and necessary for treatment of injuries sustained as a result of the motor vehicle accident of 5/2/11 involving the Petitioner.

Cross-examination of Dr. Henry

Dr. Henry was questioned regarding his billing charges and the fee schedule. Dr. Henry testified that his charges are probably higher than the fee schedule, but they take what they get paid. Dr. Henry testified that he does not review charges for other medical providers in his profession.

Dr. Henry testified he first saw Petitioner on 10/4/11 as a referral from Dr. Bruns. He testified Petitioner suffered herniated discs at C5-C6 & C6-C7. Dr. Henry testified there are many causes of herniated discs, which could include **trauma**, wear and tear, sneezing & aging. Dr. Henry also testified that a person could have a herniated disc their whole life without symptoms. Dr. Henry testified that Petitioner was asymptomatic before the accident.

Dr. Henry testified that his initial diagnoses were cervical spondylosis, degenerative disc disease, and cervical facet strain.

Dr. Henry testified that the Petitioner was unable to work.

Dr. Henry testified that Petitioner had pre-existing degenerative disc disease, but he never complained of pain before the accident.

Direct examination of Dr. Bruns

Dr. Bruns testified that he was a licensed chiropractor in Illinois since 1985. Dr. Bruns testified that he saw Petitioner after the accident and was given a history of Petitioner being involved a motor vehicle accident on 5/2/11 when a car turned left in front of Petitioner.

Dr. Bruns testified Petitioner had pain in his neck shoulders and back and diagnosed Petitioner with muscle spasm of the neck and shoulder, nerve root compression in the neck and back, cervicalgia, acute trauma hyperflexion, headache, and lumbar muscle spasms.

Dr. Bruns testified that Petitioner had no prior problems prior to the motor vehicle accident.

Dr. Bruns testified that he treated Petitioner with physical therapy, hot moist packs, muscle stimulator, ultrasound, massage therapy, chiropractic adjustments, and neuromuscular rehabilitation.

Dr. Bruns testified he continues to treat Petitioner through the present time. Dr. Bruns testified his treatment has reduced some of the pain, but Petitioner still has chronic pain.

Dr. Bruns testified that he has kept Petitioner off work.

Dr. Bruns testified Petitioner has severe loss of movement in his neck, severe pain and headaches.
Dr. Bruns testified this his treatment rendered was reasonable and necessary as a result of the motor vehicle accident.

Dr. Bruns testified that his charges were reasonable in like and similar communities.

Dr. Bruns testified that his considerable amount of treatment was necessary due to Petitioner's amount of pain, the injury and Petitioner's inability to function daily. Dr. Bruns testified his treatment was intensive chiropractic treatment.

Cross-examination of Dr. Bruns

Dr. Bruns testified he knew what the Medical Fee Schedule was. Dr. Bruns testified he would be paid per the Fee Schedule and adjust the charges accordingly. Dr. Bruns testified his office manager was responsible for billing for services performed.

Dr. Bruns testified he attended chiropractic school.

Dr. Bruns testified he has hospital privileges to order MRI's, x-rays or bloodwork at Proctor Hospital, Pekin Hospital and Methodist Medical Center. Dr. Bruns testified he could not prescribe any medication or admit someone to the hospital.

Dr. Bruns testified he has a diplomate in physical therapy.

Dr. Bruns testified he is a certified chiropractic radiologist.

Dr. Bruns testified he first saw Petitioner on 5/11/11 and he was given a history of the motor vehicle accident being a work-related injury. Dr. Bruns further testified that Petitioner gave a history that the auto accident was not his fault.

Dr. Bruns testified he continued to treat Petitioner and that Petitioner's condition was better than it would have been without his treatment.

Dr. Bruns testified he made recommendations on what would benefit Petitioner's treatment.

Dr. Bruns testified that he initially said Petitioner could go back to restricted work, however that only lasted a few weeks and he was taken completely off work through the present time.

ADDITIONAL FINDINGS OF FACTS:

Petitioner was referred to Dr. Patrick O'Leary at Midwest Orthopaedic Center by Dr. Kevin Henry. Petitioner has been under the care of Dr. Parick T. O'Leary for his serious cervical injury. The record reflects in Exhibit 4 (the medical records of Dr. Patrick T. O'Leary, admitted into evidence) the following:

> HPI: He returns today. He is a 54-year old right-hand dominant male. He was previously employed at Konica Minolta Business Solutions. His job was to repair copiers. On May 2, 2011, he was driving; he was working at the time; he was on his way to a job site. He was hit head-on by another vehicle. He had to be extracted from the vehicle. He was taken to the ER. Basically, since that time, he has had chiropractic care, injections and other care for his neck, including a CT scan, an MRI and ultimately x-rays. He was initially referred to see me last August of 2012. He denies ever having any significant symptoms with his neck or arms since that time. I initially recommended a C5-C6 and C6-C7 ACDF. (Anterior cervical diskectomy with interbody arthrodesis).

Midwest Orthopaedic requested the workers' compensation carrier to approve the surgery and the workers' compensation insurance company refused approval for the surgery.

Dr. O'Leary, in his medical records of January 15, 2013, points out:

> "On the MRI, it appears that he has disk herniations at C5-C6, left of center, and right of center at C6-C7. These do abut the spinal cord."

Exhibit 4 further states:

> "IMPRESSION:
> 1. Cervical disk herniation, C5-C6 and C6-C7.
> 2. Neck and arm pain."

> PLAN: "I think he would be a reasonable candidate for a 2-level ACDF (Anterior cervical diskectomy with interbody arthrodesis.). . . I do not expect him to be pain free after an operation like this as a reasonable outcome. I think I can improve his pain by removing the disk herniations and stabilizing that portion of his neck, which presumably limits his upward cervical extension and causes the arm pain at present today – that is, his positive Spurling maneuver."

Dr. O'Leary addresses causation and clearly points out that, inasmuch as Ronald Giddens never had any prior injury to his cervical area and had no prior complaints of pain in his cervical area, the following was concluded:

> "Most of the events of his current symptoms seem to point to the auto accident from nearly 2 years ago now. He has had extensive care for this, and it is my feeling that he would benefit from a surgery.
> The patient denies having any symptoms prior to the accident. Certainly, this kind of mechanism, a head-on collision where he would have to be forcibly extricated from a car could be a high enough impact to cause and/or exacerbate an underlying cervical spine condition."

The analysis of Dr. Patrick T. O'Leary, orthopedic surgeon, is credible to a reasonable degree of medical certainty and is based upon his physical examination of Ronald Giddens, as well as the verification on the MRI that Mr. Giddens has disk herniations at C5-C6, left of center, and right of center at C6-C7. The fact that Mr. Giddens had no prior neck pain or prior injury before the motor vehicle crash of May 2, 2011, further verifies causation and the mechanism of the head-on crash where Mr. Giddens had to be forcibly extricated from the vehicle indicates a significant impact likely to have caused the cervical spine condition found on the MRI.

RESPONDENT'S REQUESTED MEDICAL EXAMS

Respondent requested a medical examination of Mr. Ronald Giddens, and Mr. Giddens made himself available for an out-of-town evaluation by Dr. Michael D. Watson on September 12, 2011. The medical examination requested by Respondent through Dr. Michael D. Watson revealed, on September 12, 2011, per the physical examination, as follows:

> "The patient (Ronald Giddens) has obvious muscle spasms in his paracervical musculature. He is tender posteriorly. There is pain with all motion including flexion, extension, and lateral bending. He has a limited rotation of the cervical spine because of the pain. . . He is tender in the trapezius bilaterally."

Dr. Watson reviewed the MRI scan and reported as follows (Respondent's Exhibit No. 6 and contained in Petitioner's Exhibit 6). "His MRI scan reveals mild disk degeneration especially at the C5-6 and C6-C7 level with straightening of the cervical spine. There is also some canal and foraminal stenosis which is worse at the C5-C6 level and is asymmetric to the left and at C6-7 level it is asymmetric to the right."

Dr. Watson concluded with regard to his exam as follows:

> "I do believe that there is a causal relatedness to the diagnosis and to the injury as described. . . I do believe that further treatment is necessary. I would recommend that he be evaluated by a cervical spine specialist either in the Orthopedic or Neurosurgery field. I also believe that continued chiropractic treatment may be

beneficial as he is getting some temporary pain relief from these treatments. I do not believe that there are any pre-existing conditions."

Dr. Watson, with regard to Respondent's requested medical exam, further stated his opinion on September 12, 2011:

"I do not feel that he has reached maximum medical improvement."

The IME by Dr. Watson supported Petitioner's claim in diagnosis, causation and approval of treatment and a recommendation of additional treatment by either orthopedic or neurosurgery. This is the course of treatment that occurred with the referral to orthopedic physician, Dr. Patrick T. O'Leary, who requested approval of workers' compensation for the ACDF surgery. The Respondent's IME also recommended that "continued chiropractic treatment may be beneficial as he is getting some temporary pain relief from these treatments." This again is the course of treatment followed and recommended by the physician chosen by Respondent.

The Respondent, after receiving the IME report of Dr. Watson, scheduled the Petitioner for a second exam with Dr. Stephen Delheimer. The letter regarding this appointment was dated October 20, 2011, and the appointment with Dr. Delheimer was scheduled for November 28, 2011

Dr. Delheimer noted on exam that Petitioner does complain of pain in his neck with extension. Dr. Delheimer's opinion was Petitioner suffered a cervical strain/soft tissue injury as a result of the vehicle accident. Further, Dr. Delheimer's opinion was that there was no causal relationship between the motor vehicle accident and injury related cervical strain. Dr. Delheimer further gave the opinion that no further treatment was needed and placed Petitioner at maximum medical improvement eight weeks after the motor vehicle accident.

Dr. Delheimer's opinion contradicts those of Dr. Watson, the Respondent's first independent medical examiner.

On September 27, 2011, Konica Minolta, by letter to Mr. Ronald Giddens, stated "your employment with Konica Minolta will be terminated effective today, September 27, 2011." Konica Minolta is aware of the restrictions at that time involving Mr. Giddens imposed by Dr. Michael A. Bruns indicating "Patient is restricted to 4 hour work days, light duty restriction: no lifting over 20 lbs." (Petitioner's Exhibit 6).

Konical Minolta, in their letter to Mr. Giddens of September 27, 2011, stated:

> "Based on a review of all of the information that has been provided to us, to include your physician's indication that you will be unable to perform the necessary functions of your position for an undetermined period of time, Konica Minolta is unable to grant a further accommodation due to business necessity. Therefore, your employment with Konica Minolta will be terminated effective today, September 27, 2011."

Konica Minolta terminated Mr. Giddens' employment on September 27, 2011, due to "business necessity" and he has not worked at any gainful employment since September 27, 2011.

On November 28, 2011, Konica Minolta stopped payment of temporary total disability checks to Mr. Giddens and except for a payment of $2,500, Respondent has made no further payments of workers' compensation to Mr. Giddens since November 28, 2011. Temporary total disability payments are owed to Mr. Giddens since November 28, 2011, to the present date at the rate of $396.66 per week. This totals 81 5/7 weeks before giving Respondent credit for all payments made to date.

MEDICAL BILLS

Petitioner submitted the following medical bills as Petitioner's Exhibit 3:

Advanced Medical Transport, #11-19428	$827.00
Methodist Medical Center, #11122-00412	$571.00
Dr. John Lovell, #6934	$110.00
Bruns Chiropractic Office, #1001725	$48,391.81
IL Regional Pain Institute, #7419	$8,729.00
IWP #133754	$753.60
Midwest Orthopaedic Center, #310682	$1,050.00
IPMR, #332520	$1,742.00
Peoria Day Surgery Center, #425029	$5,514.00
TOTAL:	**$67,688.41**

CONCLUSIONS OF LAW

After reviewing the evidence and Petitioner's testimony, the Arbitrator finds the following:

1. The Arbitrator finds the Petitioner sustained a motor vehicle accident during the course of his employment on 5/2/11.

2. The Arbitrator finds a causal connection between the motor vehicle accident and Petitioner's current condition of ill-being. The Arbitrator further finds a causal connection between the motor vehicle accident and the need for the C5-C6 and C6-C7 ACDF (Anterior cervical diskectomy with interbody arthrodesis) recommended by Dr. Patrick O'Leary.

3. The Arbitrator orders the Respondent is liable for the C5-C6 and C6-C7 ACDF (Anterior cervical diskectomy with interbody arthrodesis) recommended by Dr. O'Leary. Further, Respondent should pay all related medical expenses for the anterior interbody fusion recommended by Dr. Patrick O'Leary.

4. The Arbitrator finds the opinions of Dr. Stephen Delheimer not credible.

5. Respondent shall be given a credit for $10,606.94 for TTD benefits paid.

6. Respondent shall be given a credit of $6,986.82 for medial benefits that have been paid, and Respondent shall hold petitioner harmless from any claims by any providers of the services for which Respondent is receiving this credit, as provided in Section 8(j) of the Act.

7. Respondent shall pay Petitioner temporary total disability benefits of $396.66/week for 81 5/7 weeks, commencing 11/28/11 through 6/24/13, as provided in Section 8(b) of the Act.

8. Respondent shall pay reasonable and necessary medical services, pursuant to the medical fee schedule, for the following medical bills, as provided in Sections 8(a) and 8.2 of the Act:

Advanced Medical Transport, #11-19428	$827.00
Methodist Medical Center, #11122-00412	$571.00
Dr. John Lovell, #6934	$110.00
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IPMR, #332520	$1,742.00
Peoria Day Surgery Center, #425029	$5,514.00
TOTAL:	**$67,688.41**

9.The Arbitrator does not award penalties.

In no instance shall this award be a bar to subsequent hearing and determination of additional amount of temporary total disability, medical benefits or compensation for a permanent injury, if any.

STATE OF ILLINOIS)
) SS.
COUNTY OF MADISON)

☒ Affirm and adopt (no changes)	☐ Injured Workers' Benefit Fund (§4(d))
☐ Affirm with changes	☐ Rate Adjustment Fund (§8(g))
☐ Reverse Choose reason	☐ Second Injury Fund (§8(e)18)
	☐ PTD/Fatal denied
☐ Modify Choose direction	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Scott Durham,

Petitioner,

vs. NO: 12 WC 41182

Olin Winchester,

14IWCC0380

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review under §19(b) having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issues of accident, temporary total disability, medical expenses, and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof. The Commission further remands this case to the Arbitrator for further proceedings for a determination of a further amount of temporary total compensation or of compensation for permanent disability, if any, pursuant to Thomas v. Industrial Commission, 78 Ill.2d 327, 399 N.E.2d 1322, 35 Ill.Dec. 794 (1980).

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed April 15, 2013, is hereby affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that this case be remanded to the Arbitrator for further proceedings consistent with this Decision, but only after the latter of expiration of the time for filing a written request for Summons to the Circuit Court has expired without the filing of such a written request, or after the time of completion of any judicial proceedings, if such a written request has been filed.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner interest under §19(n) of the Act, if any.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall have credit for all amounts paid, if any, to or on behalf of Petitioner on account of said accidental injury.

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $12,600.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: MAY 27 2014
TJT:yl
o 3/25/14
51

Thomas J. Tyrrell

Michael J. Brennan

Kevin W. Lamborn

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF 19(b) DECISION OF ARBITRATOR

BURHAM, SCOTT
Employee/Petitioner

Case# **12WC041182**

OLIN WINCHESTER
Employer/Respondent

14IWCC0380

On 4/15/2013, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.09% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

A copy of this decision is mailed to the following parties:

0895 MORMINO VELLOFF EDMONDS SNIDER
J ROBERTS EDMONDS
3517 COLLEGE AVE
ALTON, IL 62002

0299 KEEFE & DEPAULI PC
MICHAEL F KEEFE
#2 EXECUTIVE DR
FAIRVIEW HTS, IL 62208

14IWCC0380

STATE OF ILLINOIS)
)SS.
COUNTY OF Madison)

☐ Injured Workers' Benefit Fund (§4(d))
☐ Rate Adjustment Fund (§8(g))
☐ Second Injury Fund (§8(e)18)
☒ None of the above

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

Scott Durham
Employee/Petitioner

v.

Olin Winchester
Employer/Respondent

Case # 12 WC 041182

Consolidated cases: _____

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Joshua Luskin**, Arbitrator of the Commission, in the city of **Collinsville**, on **February 22, 2013**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. ☐ Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. ☐ Was there an employee-employer relationship?
C. ☒ Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. ☐ What was the date of the accident?
E. ☐ Was timely notice of the accident given to Respondent?
F. ☒ Is Petitioner's current condition of ill-being causally related to the injury?
G. ☐ What were Petitioner's earnings?
H. ☐ What was Petitioner's age at the time of the accident?
I. ☐ What was Petitioner's marital status at the time of the accident?
J. ☒ Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. ☒ Is Petitioner entitled to any prospective medical care?
L. ☒ What temporary benefits are in dispute?
☐ TPD ☐ Maintenance ☒ TTD
M. ☒ Should penalties or fees be imposed upon Respondent?
N. ☐ Is Respondent due any credit?
O. ☐ Other _____

14IWCC0380

FINDINGS

On the date of accident, **10/31/2012**, Respondent ***was*** operating under and subject to the provisions of the Act.

On this date, an employee-employer relationship ***did*** exist between Petitioner and Respondent.

On this date, Petitioner ***did*** sustain an accident that arose out of and in the course of employment.

Timely notice of this accident ***was*** given to Respondent.

Petitioner's current condition of ill-being ***is*** causally related to the accident.

The parties stipulated that the average weekly wage calculated pursuant to Section 10 was **$1,153.85**.

On the date of accident, Petitioner was **41** years of age, ***married*** with **2** dependent children.

Respondent ***has not*** paid all reasonable and necessary charges for all reasonable and necessary medical services.

Respondent shall be given a credit of **$N/A** for TTD, **$N/A** for TPD, **$N/A** for maintenance, and **$N/A** for other benefits, for a total credit of **$N/A**.

Respondent is entitled to a credit of **$All paid by group** under Section 8(j) of the Act.

ORDER

SEE ATTACHED DECISION

In no instance shall this award be a bar to subsequent hearing and determination of an additional amount of medical benefits or compensation for a temporary or permanent disability, if any.

RULES REGARDING APPEALS Unless a party files a *Petition for Review* within 30 days after receipt of this decision, and perfects a review in accordance with the Act and Rules, then this decision shall be entered as the decision of the Commission.

STATEMENT OF INTEREST RATE If the Commission reviews this award, interest at the rate set forth on the *Notice of Decision of Arbitrator* shall accrue from the date listed below to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

Signature of Arbitrator

Apr. 19, 2013
Date

ICArbDec19(b)

APR 15 2013

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

SCOTT DURHAM,	)	
	)	
Petitioner,	)	
	)	
vs.	)	No. 12 WC 41182
	)	
OLIN WINCHESTER,	)	
	)	
Respondent.	)	

ADDENDUM TO ARBITRATION DECISION

This matter was heard pursuant to Section 19(b) of the Act.

STATEMENT OF FACTS

The claimant, 42 years old on the date of trial, had worked as a bullet tumbler and forklift operator for the respondent at its ammunition manufacturing plant from May 2008 through October 2012. The claimant described having to maneuver barrels full of bullet jackets (the hollow piece into which lead is pressed to produce the projectile). The barrels are approximately three feet tall, two feet in diameter, and weigh about 75 pounds when empty. When full, the barrels weigh between four to five hundred pounds. The petitioner testified that as part of his job, he would physically move the barrels from a holding area to the assembly area as needed. This would be accomplished by tilting the barrel so that one side of the base would be approximately 10-12" off the ground and then rolling the barrel on the edge. The claimant testified that this was a routine activity.

The petitioner testified that he arrived for his usual midnight shift at 11 PM on October 30, 2012. At approximately 12:50 AM on October 31, he was tilting a barrel back to move it and it pulled him forward. He asserted feeling immediate low back pain radiating down his leg. This accident was apparently unwitnessed. He reported it to his supervisor, Dave Plough, at that time and went to the medical clinic.

The Olin clinic notes were introduced as PX13. They demonstrate a history consistent with the claimant's description of events. They note prior low back in 2009 and a history of lumbar and cervical fractures following a 2011 motor vehicle accident. The clinic sent him to St. Anthony's Hospital in Alton for evaluation.

The records of St. Anthony's Hospital emergency room (PX3) note a similar history of accident and recitation of symptoms. They provided an injection and medication at that time and he was transported back to the respondent's facility.

The petitioner thereafter began treatment with Dr. Jeffery Pfeifer, a chiropractor, on November 5, 2012. See PX1, PX2, PX11. The petitioner related a similar history of accident. Dr. Pfeifer assessed sciatica, prescribed the claimant off work and ordered an MRI. The MRI was performed on November 9, 2012. See PX4. It noted degenerative disk disease with disk bulges at two levels, but no herniation was observed. Dr. Pfeifer thereafter referred the claimant to a spine surgeon. In deposition, Dr. Pfeifer testified that believed the treatment was medically necessary and was related to the workplace accident as described by the claimant.

The petitioner saw Dr. Matthew Gornet on January 7, 2013. See PX9-10. He provided a similar history of accident to Dr. Gornet. Following examination, Dr. Gornet prescribed oral steroids and advised he would need to review the actual films of the MRI. On January 10, Dr. Gornet reviewed the films and recommended epidural injection. He opined the current symptoms and need for treatment were causally related to the accident as described by the petitioner.

The petitioner testified that epidural injections had been done (those records were apparently not available at the time of trial) and was scheduled to see Dr. Gornet on February 25, 2013 for further evaluation. He further testified that he continued to have low back pain with radiation into his left leg which interfered with his daily activities.

After the petitioner had returned from St. Anthony's ER, he was brought to the conference room, met with a representative from Labor Relations, and was terminated. The petitioner admitted that there had been an allegation in which he had threatened a co-worker on or about October 19, 2012, as well as at least one other disciplinary problem. The petitioner denied prior knowledge of his pending termination. The petitioner admitted that he had in fact called off the prior shift (Oct. 29-30) and asserted this was for family reasons. The respondent called Mr. David Plough to testify. Mr. Plough confirmed that the petitioner was under investigation and was scheduled to be terminated. He testified that the termination meeting was originally scheduled for the October 29 shift, but had not personally discussed that issue with the claimant.

OPINION AND ORDER

Accident and Causal Relationship

Given the close relationship between these issues in this matter, the Arbitrator will address them jointly. A claimant has the burden of proving by the preponderance of credible evidence all elements of the claim, including that the alleged injury arose out of and in the course of employment. The respondent submits the claimant has contrived or manufactured a claim of accident, or at least has not credibly demonstrated the occurrence of a legitimate one. The respondent points toward a highly coincidental sense of timing – and indeed, from the claimant's perspective, it would indeed be a fortuitous one. The claimant was under investigation for misbehavior, calls off of work for

allegedly unrelated reasons on the day he was originally supposed to be either disciplined or terminated, and then on his very next working day suffers an unwitnessed accident shortly before the termination meeting can occur.

The question of timing aside, the petitioner describes an incident that is certainly within the bounds of what could be expected at his job. Moreover, this incident, presuming it did in fact occur, is consistent with the injury related by the claimant.

The respondent's suspicions are certainly understandable, and may well be true. Having reviewed the evidence as a whole, however, the Arbitrator concludes that the petitioner has met the threshold of proving accident.

His treating physicians have assessed causation presuming accident and while the petitioner did have prior back complaints, there is a lack of evidence of ongoing symptoms or treatment prior to October 30. Accordingly, the Arbitrator concludes that causal connection has thus far been demonstrated.

Medical Treatment (Past and Prospective)

The petitioner has submitted medical bills of $726 for Dr. Gornet, $2,466.50 for the emergency room visit, $3,073.00 for the MRI, and $3,847.00 for Dr. Pfeifer. These bills appear medically necessary. The respondent shall accordingly satisfy these expenses within the limits of Section 8.2 of the Act. Respondent shall receive credit for any and all amounts previously paid but shall hold the petitioner harmless, pursuant to 8(j) of the Act, for any group health carrier reimbursement requests for such payments.

The respondent shall further pay for the February 25, 2013 appointment with Dr. Gornet. Whatever further treatment may be recommended at that appointment is speculative and therefore not appropriately addressed at this time.

Temporary Total Disability

The dispute as to TTD was based on liability. In accordance with the above findings, the Arbitrator orders TTD from November 1, 2012, through February 22, 2013. The respondent shall pay the petitioner $769.23 per week for 16 & 2/7 weeks, a total liability of $12,527.46.

Penalties and Fees

The Illinois Supreme Court has long recognized the imposition of penalties is a question to be considered in terms of reasonableness. *Avon Products, Inc. v. Industrial Commission*, 82 Ill.2d 297 (1980); *Smith v. Industrial Commission*, 170 Ill.App.3d 626 (3rd Dist. 1988). In the *Avon* case, the Court looked to Larson on Workmen's

Compensation for guidance, noting that penalties for delayed payment are not intended to inhibit contests of liability or appeals by employers who honestly believe an employee not entitled to compensation. 3 A. Larson, Workmen's Compensation sec 83.40 (1980). Moreover, the Commission need not award compensation even if the claimant's version of relevant events is undisputed. *Smith v. Industrial Commission*, 98 Ill.2d 20 (1983).

The Arbitrator believes that the fact that coincidences do occur does not impose a requirement that people should trust them. The respondent's skepticism was articulated, reasonable and supported by the evidence. Penalties and fees are denied.